CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 30 **MAY 8, 1996** **NO. 19**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

General Notices

PROPOSED COLLECTION; COMMENT REQUEST

REQUEST FOR TEMPORARY IDENTIFICATION CARD

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Request for Temporary Identification Card. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 25, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Request for Temporary Identification Card
OMB Number: 1515–0128
Form Number: N/A
Abstract: Cartmen, Lightermen, and airport employers may request a temporary identification card to be issued to their employees if they can show that a hardship to their business would result pending the issuance of a permanent identification card.
Current Action: There are no changes to the information collection. This submission is being submitted to extend the expiration date.
Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 150
Estimated Time Per Respondent: 30 minutes
Estimated Total Annual Burden Hours: 300
Estimated Total Annualized Cost on the Public: $1,200

Dated: April 18, 1996.

JOHN TURNER,
Acting Leader,
Printing and Records Services Group.

[Published in the Federal Register, April 26, 1996 (61 FR 18640)]

PROPOSED COLLECTION; COMMENT REQUEST

ENTRY AND MANIFEST OF MERCHANDISE FREE OF DUTY

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Entry and Manifest of Merchandise Free of Duty. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 25, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed

to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Entry and Manifest of Merchandise Free of Duty

OMB Number: 1515–0051

Form Number: Customs Form 7523

Abstract: Customs Form 7523 is used by carriers and importers as a manifest for the entry of merchandise free of duty under certain condition and by Customs to authorize the entry of such merchandise. It is also used by carriers to show that the articles being imported are to be released to the importer or consignee.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Business or other for-profit institutions

Estimated Number of Respondents: 4,950

Estimated Time Per Respondent: 5 minutes

Estimated Total Annual Burden Hours: 8,247

Estimated Total Annualized Cost on the Public: $123,700

Dated: April 18, 1996.

JOHN TURNER,
Acting Leader,
Printing and Records Services Group.

[Published in the Federal Register, April 26, 1996 (61 FR 18640)]

PROPOSED COLLECTION; COMMENT REQUEST

DISCLOSURE OF INFORMATION ON INWARD AND OUTWARD VESSEL MANIFEST

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Disclosure of Information on Inward and Outward Vessel Manifest. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 25, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Disclosure of Information on Inward and Outward Vessel Manifest

OMB Number: 1515–0124

Form Number: N/A

Abstract: This information is used to grant a domestic importer's, consingee's, and exporter's request for confidentially of its identy from public disclosure.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 578
Estimated Time Per Respondent: 30 minutes
Estimated Total Annual Burden Hours: 289
Estimated Total Annualized Cost on the Public: $1,400

Dated: April 18, 1996.

JOHN TURNER,
Acting Leader,
Printing and Records Services Group.

[Published in the Federal Register, April 26, 1996 (61 FR 18641)]

PROPOSED COLLECTION; COMMENT REQUEST

FOREIGN TRADE ZONE ANNUAL RECONCILIATION CERTIFICATION AND RECORD KEEPING REQUIREMENT

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Foreign Trade Zone Annual Reconciliation Certification and Record Keeping Requirement. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 25, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44

U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Foreign Trade Zone Annual Reconciliation Certification and Record Keeping Requirement

OMB Number: 1515–0151

Form Number: N/A

Abstract: Each Foreign Trade Zone Operator will be responsible for maintaining its inventory control in compliance with statue and regulations. The operator will furnish Customs an annual certification of their compliance.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Business or other for-profit institutions

Estimated Number of Respondents: 171

Estimated Time Per Respondent: 70 minutes

Estimated Total Annual Burden Hours: 199

Estimated Total Annualized Cost on the Public: $855

Dated: April 18, 1996.

JOHN TURNER,
Acting Leader,
Printing and Records Services Group.

[Published in the Federal Register, April 26, 1996 (61 FR 18641)]

PROPOSED COLLECTION; COMMENT REQUEST

DOCUMENTS REQUIRED ABOARD PRIVATE AIRCRAFT

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Documents Required Aboard Private Aircraft. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 25, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Documents Required Aboard Private Aircraft

OMB Number: 1515–0175

Form Number: N/A

Abstract: The documents required by Customs regulations for private aircraft arriving from foreign countries pertain only to baggage declarations. Customs' also requires that the pilots present documents required by FAA to be on the plane.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 144,000
Estimated Time Per Respondent: 1 minutes
Estimated Total Annual Burden Hours: 2,390
Estimated Total Annualized Cost on the Public: $38,240

Dated: April 18, 1996.

JOHN TURNER,
Acting Leader,
Printing and Records Services Group.

[Published in the Federal Register, April 26, 1996 (61 FR 18642)]

PROPOSED COLLECTION; COMMENT REQUEST

AUTOMOTIVE PRODUCTS TRADE ACT OF 1965

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Automotive Products Trade Act of 1965. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 25, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of informa-

tion technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Automotive Products Trade Act of 1965
OMB Number: 1515–0178
Form Number: N/A
Abstract: The documents required by Customs regulations for private aircraft arriving from foreign countries pertain only to baggage declarations. Customs' also requires that the pilots present documents required by FAA to be on the plane.
Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.
Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 210
Estimated Time Per Respondent: 12 hours
Estimated Total Annual Burden Hours: 27,510
Estimated Total Annualized Cost on the Public: $290,850

Dated: April 18, 1996.

JOHN TURNER,
Acting Leader,
Printing and Records Services Group.

[Published in the Federal Register, April 26, 1996 (61 FR 18642)]

PROPOSED COLLECTION; COMMENT REQUEST

LINE RELEASE REGULATIONS

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Line Release Regulations. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 25, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Line Release Regulations
OMB Number: 1515–0181
Form Number: N/A
Abstract: Line release was developed to release and track high volume and repetitive shipments using bar code technology and PCS. An application is submitted to Customs by the filer and a common commodity classification code (C4) is assigned to the application.
Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.
Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 168
Estimated Time Per Respondent: 15 minutes
Estimated Total Annual Burden Hours: 4,200
Estimated Total Annualized Cost on the Public: $285,000

Dated: April 18, 1996.

JOHN TURNER,
Acting Leader,
Printing and Records Services Group.

[Published in the Federal Register, April 26, 1996 (61 FR 18643)]

PROPOSED COLLECTION; COMMENT REQUEST

INWARD CARGO MANIFEST FOR VESSELS

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Inward Cargo Manifest for Vessels. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments should be received on or before June 25, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Inward Cargo Manifest for Vessels

OMB Number: 1515–0049

Form Number: Customs Form 7533

Abstract: Vessels under five tons and any vehicle carrying merchandise and arriving from contiguous country must report their arrival in the U.S. and produce a manifest on Customs Form 7533 listing merchandise being conveyed.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 20,000
Estimated Time Per Respondent: 5 minutes
Estimated Total Annual Burden Hours: 41,650
Estimated Annualized Cost to the Public: $499,800

Dated: April 18, 1996.

JOHN TURNER,
Acting Leader,
Printing and Records Services Group.

[Published in the Federal Register, April 26, 1996 (61 FR 18643)]

PROPOSED COLLECTION; COMMENT REQUEST

PETITION FOR REMISSION OR MITIGATION

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Petition for Remission or Mitigation. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments should be received on or before June 25, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of informa-

tion technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Petition for Remission or Mitigation
OMB Number: 1515–0052
Form Number: Customs Form 4609
Abstract: Persons who's property is seized or who incur monetary penalties due to violations of the Tariff Act are entitled to seek remission or mitigation by means of an informal appeal. This form gives the violator the opportunity to claim mitigation and provides a record of such administrative appeals.
Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.
Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 28,000
Estimated Time Per Respondent: 19 minutes
Estimated Total Annual Burden Hours: 8,834
Estimated Annualized Cost to the Public: N/A

Dated: April 18, 1996.

JOHN TURNER,
Acting Leader,
Printing and Records Services Group.

[Published in the Federal Register, April 26, 1996 (61 FR 18644)]

PROPOSED COLLECTION; COMMENT REQUEST

MASTER'S OATH OF VESSEL IN FOREIGN TRADE

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Master's Oath of Vessel in Foreign Trade. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments should be received on or before June 25, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Master's Oath of Vessel in Foreign Trade

OMB Number: 1515–0060

Form Number: Customs Form 1300

Abstract: CF–1300 is used by the master of a vessel to attest to the truthfulness of all other forms associated with the manifest. The form also serves to record information on the tonnage tax to prevent overpayment of that tax.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Business or other for-profit institutions

Estimated Number of Respondents: 12,000

Estimated Time Per Respondent: 5 minutes

Estimated Total Annual Burden Hours: 21,991

Estimated Annualized Cost to the Public: $285,820

Dated: April 18, 1996.

JOHN TURNER,
Acting Leader,
Printing and Records Services Group.

[Published in the Federal Register, April 26, 1996 (61 FR 18644)]

PROPOSED COLLECTION; COMMENT REQUEST

CERTIFICATE OF ORIGIN

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Certificate of Origin. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 25, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Certificate of Origin

OMB Number: 1515–0055

Form Number: Customs Form 3229

Abstract: This certification is required to determine whether an importer is entitled to duty-free for goods which are the growth or product of a U.S. insular possession and which contain foreign materials representing no more than 70 percent of the goods total value.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 10
Estimated Time Per Respondent: 20 minutes
Estimated Total Annual Burden Hours: 113
Estimated Total Annualized Cost on the Public: $1,030

Dated: April 18, 1996.

JOHN TURNER,
Acting Leader,
Printing and Records Services Group.

[Published in the Federal Register, April 26, 1996 (61 FR 18645)]

PROPOSED COLLECTION; COMMENT REQUEST

IMMEDIATE DELIVERY APPLICATION

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Immediate Delivery Application. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments should be received on or before June 25, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of informa-

tion technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Immediate Delivery Application

OMB Number: 1515–0069

Form Number: Customs Form 3461 and 3461 Alternate

Abstract: Customs Form 3461 and 3461 Alternate are used by importers to provide Customs with the necessary information in order to examine and release imported cargo.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Business or other for-profit institutions

Estimated Number of Respondents: 6,100

Estimated Time Per Respondent: 30 minutes

Estimated Total Annual Burden Hours: 838,158

Estimated Annualized Cost to the Public: $11,440,860

Dated: April 18, 1996.

JOHN TURNER,
Acting Leader,
Printing and Records Services Group.

[Published in the Federal Register, April 26, 1996 (61 FR 18645)]

PROPOSED COLLECTION; COMMENT REQUEST

AUTOMATED SURETY INTERFACE

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Automated Surety Interface. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 25, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue N.W., Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Automated Surety Interface
OMB Number: 1515–0196
Form Number: N/A
Abstract: This rule is to implement the Automated Surety Interface, a module of the Automated Commercial System (ACS) through which participating sureties will electronically provide to Customs acknowledgement that they are liable for transactions identified under their bonds.
Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.
Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 600,000
Estimated Time Per Respondent: 30 minutes
Estimated Total Annual Burden Hours: 10,155
Estimated Total Annualized Cost on the Public: Unknown

Dated: April 18, 1996.

JOHN TURNER,
Acting Leader,
Printing and Records Services Group.

[Published in the Federal Register, April 26, 1996 (61 FR 18645)]

PROPOSED COLLECTION; COMMENT REQUEST

APPLICATION FOR IDENTIFICATION CARD

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Application for Identification Card. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 25, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Application for Identification Card

OMB Number: 1515–0026

Form Number: Customs Form 3078

Abstract: Customs Form 3078 is used by licensed Cartmen, Lightermen, Warehousemen, brokerage firms, foreign trade zones, container station operators, their employees, and employees requiring access to Customs secure areas to apply for an identification card so that they may legally handle merchandise which is in Customs custody.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 7,000
Estimated Time Per Respondent: 15 minutes
Estimated Total Annual Burden Hours: 5,250
Estimated Total Annualized Cost on the Public: $63,000

Dated: April 18, 1996.

JOHN TURNER,
Acting Leader,
Printing and Records Services Group.

[Published in the Federal Register, April 26, 1996 (61 FR 18646)]

PROPOSED COLLECTION; COMMENT REQUEST

ENTRY SUMMARY AND CONTINUATION SHEET

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Entry Summary and Continuation Sheet. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments should be received on or before June 25, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of

automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Entry Summary and Continuation Sheet
OMB Number: 1515–0065
Form Number: Customs Form 7501, 7501A
Abstract: Customs Form 7501 is used by Customs as a record of the impact transaction, to collect proper duty, taxes, exactions, certifications and enforcement endorsements, and to provide copies to Census for statistical purposes.
Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.
Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 2,700
Estimated Time Per Respondent: 20 minutes
Estimated Total Annual Burden Hours: 3,454,852
Estimated Annualized Cost to the Public: $79,461,596

Dated: April 18, 1996.

JOHN TURNER,
Acting Leader,
Printing and Records Services Group.

[Published in the Federal Register, April 26, 1996 (61 FR 18646)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, April 23, 1996.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF MINI COMPACT DISC STEREO SYSTEMS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of mini compact disc stereo systems using a special flat cable. Notice of the proposed revocation was published on March 20, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 12.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 8, 1996.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On March 20,1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Number 12, proposing to revoke HQ 956284, issued on July 7, 1994, which concerned the tariff classification of three types of mini compact disc stereo systems, using a specially designed flat cable. No comments were received in response to the notice. Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking HQ 956284 to reflect the proper classification of

Aiwa mini compact disc stereo systems using a special flat cable, as composite goods, as defined by General Rule of Interpretation (GRI) 3(b). Accordingly, essential character of the systems must be determined. Customs is now of the opinion that the stereo systems are composite goods with the essential character being the amplifier/tuner. The systems are properly classifiable under subheading 8527.32.50, HTSUS, which provides for reception apparatus for radiobroadcasting, whether or not combined, in the same housing, with sound recording or reproducing apparatus or a dock. HQ 958914 revoking HQ 956284 is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: April 23, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 23, 1996.

CLA–2 RR:TC:MM 958914 RFA
Category: Classification
Tariff No. 8527.32.50

MR. DENNIS HECK
TOWER GROUP INTERNATIONAL, INC.
CASTELAZO & ASSOCIATES
5420 W. 104th Street
Los Angeles, CA 90045–6069

Re: Mini compact disc stereo systems; stereo integrated amplifiers/tuners; dual stereo cassette decks/compact disc players; remote controls; flat cables; "Goods Put Up In Sets For Retail Sale"; composite goods; GRI 3(b); Explanatory Note 3(b)(X); incomplete or unfinished functional units; Legal Note 4 to Section XVI; Headings 8520, 8527; HQs 957150, 950882, 950218, 087077; HQ 956284, revoked.

DEAR MR. HECK:

This is in reference to HQ 956284, issued to you on July 7, 1994 in which Customs classified the mini compact disc stereo systems under the Harmonized Tariff Schedule of the United States (HTSUS). In the course of ruling on similar merchandise, we have determined that HQ 956284 is incorrect. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat 2057) (1993), notice of the proposed revocation of NY 810627 was published on March 20, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 12. No comments were received in response to the notice.

Facts:

The merchandise consists of three types of mini compact disc stereo systems, all with a remote control. After importation, the systems will be repackaged with U.S.-sourced

speakers and then sold to the public. System NSX-D603 consists of a stereo integrated amplifier/tuner (model no. RX-N603), with a clock, and a dual stereo cassette (player/recorder) deck/compact disc player (model no. FD-N603). System NSX-D606 consists of a stereo integrated amplifier/tuner (model no. RX-N606), with a clock, and a dual stereo cassette (player/recorder) deck/compact disc player (FD-N606). System NSX–D707 consists of a stereo integrated amplifier/tuner (model no, RX-N707), with a clock, and a dual stereo cassette (player/recorder) deck/compact disc player (model no. FD-N707). The systems' components are designed for either horizontal or vertical placement. In each system, connection of the amplifier/tuner to the cassette deck player is effected by a specially designed flat cable included with each system. There are no common "RCA type jacks" available to interconnect the stereo components. Because the stereo system can send signals only through the flat cable, the stereo system components cannot be sold separately. The consumer must purchase the entire sound system.

Issue:

Whether the mini compact disc stereo systems are classifiable as functional unit, as "goods put up in sets for retail sale", as a composite good, or are the components classifiable separately under the HTSUS?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

The following subheadings are under consideration:

8520	Magnetic tape recorders and other sound recording apparatus, whether or not incorporating a sound reproducing device;
8520.33.00	Other magnetic tape recorders incorporating sound reproducing apparatus: [o]ther, cassette type * * * Goods classifiable under this provision have a column one, general rate of duty of 2.3 percent *ad valorem*.
8520.90.00	Other * * * Goods classifiable under this provision have a column one, general rate of duty of 2.3 percent *ad valorem*.
8527.32.50	Reception apparatus for radiotelephony, radiotelegraphy or radiobroadcasting, whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock; [o]ther radiobroadcast receivers, including apparatus capable of receiving also radiotelephony or radiotelegraphy: [n]ot combined with sound recording or reproducing apparatus but combined with a clock: [o]ther * * * Goods classifiable under this provision have a column one, general rate of duty or 4.6 percent *ad valorem*.

It is claimed that the stereo systems are functional units as defined by Legal Note 4 to section XVI, HTSUS, which states that: "[w]here a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function."

In HQ 956284, dated July 7, 1994, Customs determined that the mini compact disc stereo systems imported without their speakers, cannot be classifiable as functional units because they are not "intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85." We further note that the stereo systems imported without their speakers are incomplete. Customs has consistently held that incomplete or unfinished articles cannot be classified as unfinished functional units. *See* HQ 957150 (January 30, 1995); HQ 950218 (April 17, 1992); HQ 087077 (March 27, 1991). Therefore, the mini compact disc stereo systems fail the test as set forth under Legal Note 4 to section XVI, HTSUS.

Because each of the stereo components are *prima facie* classifiable in two or more headings, classification under GRI 1 fails, and we must apply the other GRIs. GRI 3(a) states that if a product is *prima facie* classifiable in two or more headings by application of GRI 2(b), or for any other reason, then the "heading which provides the most specific description shall be preferred to headings providing a more general description. However, when

two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods."

GRI 3(b) provides that "mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their "essential character". The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the HTSUS. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 FR 35127, 35128 (August 23, 1989). To determine what is a "set put up for retail sale", EN X to GRI 3(b), page 4, states that:

> [f]or the purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which:
>
> (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings;
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

The mini compact disc stereo system consist of at least two different articles which are *prima facie* classifiable in different headings, and they are put up together to meet the particular need of audio entertainment. However, both systems fail to meet the third criterion because after importation, they are repackaged with speakers into a master carton before they are put up for sale to the public.

Because the mini compact disc stereo systems are not classifiable as functional units, or as "goods put up in sets for retail sale", the issue to be determined is whether the stereo systems are composite goods or whether each component must be separately classified. EN (IX) to GRI 3(b), page 4, states that:

> For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.
>
> Examples of the latter category of goods are:
>
> (1) Ashtrays consisting of a stand incorporating a removable ash bowl.
>
> (2) Household spice racks consisting of a specially designed frame (usually of wood) and an appropriate number of empty spice jars of suitable shape and size.
>
> As a general rule, the components of these composite goods are put up in common packing.

The subject stereo systems consist of two separable components (an amplifier/tuner and dual cassette decks/CD player) which are adapted one to the other (through the flat cable) and are mutually complementary and that together they form a whole which is not normally offered for sale as separate components. Because of the specially designed flat cable which connects the components to form a complete stereo system, consumers cannot purchase the components separately. Based upon all these factors, we believe that the subject stereos in their condition as imported, are composite goods under the application of GRI 3(b). We further find that the essential character of the composite good is imparted by the tuner/amplifier component. Therefore, the subject stereo systems are classifiable under subheading 8527.32.50, HTSUS, as reception apparatus for radiobroadcasting. Based upon the above analysis, HQ 956284 (which classified the components separately) is incorrect.

Holding:

The mini compact disc stereo systems are classifiable under subheading 8527.32.50, HTSUS, which provides for: "[r]eception apparatus for radiotelephony, radiotelegraphy or radiobroadcasting, whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock: [o]ther radiobroadcast receivers, including apparatus capable of receiving also radiotelephony or radiotelegraphy: [n]ot combined with sound recording or reproducing apparatus but combined with a clock: [o]ther * * *." Goods classi-

fiable under this provision have a column one, general rate of duty of 4.8 percent *ad valorem*.

Effect on Other Rulings:

HQ 956284, dated July 7, 1994, is hereby revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF SLEEP BOTTOMS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of men's sleep bottoms. Notice of the proposed revocation was published March 13, 1996, in the CUSTOMS BULLETIN, Volume 30, Numbers 10/11.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 8, 1996.

FOR FURTHER INFORMATION CONTACT: Cathy Braxton, Textile Branch (202) 482–7048.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On March 13, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Numbers 10/11, proposing to revoke Headquarters Ruling Letter (HRL) 957237, dated February 6, 1995. No comments were received from interested parties.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of The North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat 2057, 2186 (1993)), this notice advises interested parties that Customs is revoking HRL 957237 to reflect proper classification of the sleep bottoms in subheading 6207.91.3010 of the Harmonized Tariff Schedule of the United States Annotated,

which provides for men's sleepwear garments similar to pajamas and nightshirts. HRL 958723, revoking HRL 957237, is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: April 22, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 22, 1996.

CLA–2 RR:TC:TE 958723 CAB
Category: Classification
Tariff No. 6207.91.3010

DORIS ACOSTA
WARNACO, INC.
90 Park Avenue, 12th Fl.
New York, NY 10016

Re: Revocation of HRL 957237, dated February 6, 1995; Sleepwear vs. Outerwear.

DEAR MS ACOSTA:

This is in reference to Headquarters Ruling Letter (HRL) 957237 issued to you by Customs Headquarters on February 6, 1995. Customs has reexamined the decision and determined that the decision was in error. HRL 957237 classified the merchandise in subheading 6203.42.4015 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Customs believes HRL 957237 should be revoked to reflect the correct tariff classification in subheading 6207.91.3010, HTSUSA. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of HRL 957237 was published on March 13, 1996, in the CUSTOMS BULLETIN, Volume 30, Numbers 10/11.

Facts:

The articles at issue, Style U7130 and Style U7131; are men's woven brushed cotton pants. They have an elasticized turned-over waistband with a functional drawstring, a one-button closure at the waist, a placketed fly opening with a two-button closure, two inserted side seam pockets, a rear pocket with a one-button closure and hemmed leg bottoms. The words "Calvin Klein" are printed on the exterior surface of the waistband at recurrent intervals.

Issue:

Whether the subject garment is classifiable as sleepwear under Heading 6207, HTSUSA, or as outerwear under Heading 6203, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

In determining the classification of garments submitted to be sleepwear, Customs usually considers the factors discussed in two court cases that dealt with sleepwear. In *Mast Industries, Inc. v. United States*, 9 CIT 549, 552 (1985), *aff'd* 786 F.2d 144 (CAFC, April 1, 1986), the Court of International Trade considered the classification of a garment claimed to be sleepwear. The court cited several lexicographic sources, among them *Webster's Third New International Dictionary* which defined "nightclothes" as "garments to be worn to bed." In *Mast*, the court determined that the garment at issue therein was designed, manufactured, and used as nightwear and therefore was classifiable as nightwear. Similarly, in *St. Eve International, Inc. v. United States*, 11 CIT 224 (1987), the court ruled the garments at issue therein were manufactured, marketed and advertised as nightwear and were chiefly used as nightwear.

Initially, when these articles were classified in HRL 957237, no evidence was submitted on the importer's behalf substantiating how these garments were marketed and used. In an effort to determine how this class of garments was treated in the trade, a Customs National Import Specialist surveyed several department stores and concluded that garments substantially identical to Styles U7130 and U7131 were intended and sold as loungewear. However, with this request for reconsideration of HRL 957237, evidence has been presented to Customs in support of your claim that these garments are sleepwear and should be classified as sleepwear under Heading 6207, HTSUSA. You emphasize that these garments will be purchased by major department stores in their underwear/sleepwear sections. You state that the garments are designed for wear to bed due to the lightweight flannel fabric and the loose, roomy construction. You state that a Calvin Klein Underwear marketing description used for soliciting customers for these garments describes them as "flannel pajamas". You have submitted pictures depicting the subject merchandise in the underwear/sleepwear department in several different retail stores. You have also submitted purchase orders which identify the subject garments as articles belonging to the sleepwear/underwear departments of the manufacturer.

As stated in *Mast*, "most consumers tend to purchase and use a garment in the manner in which it is marketed." You maintain that these garments are marketed as sleepwear and have submitted documents supporting this claim. Although the garments possess features not generally associated with men's sleepwear bottoms, such as the side-seam pockets and the rear pocket with button closure, they also possess features such as the overall styling of the garment and the fabric construction which are associated with sleepwear. When viewing these characteristics with the additional information provided regarding the marketing, Customs agrees that these garments will be principally used as sleepwear and are classifiable under Heading 6207, HTSUSA.

Holding:

Based on the foregoing, Styles U7130 and U7131 are properly classified in subheading 6207.91.3010, HTSUSA, which provides for men's sleepwear garments similar to pajamas and nightshirts. The applicable rate of duty is 6.4 percent *ad valorem* and the textile restraint category is 351.

HRL 957237 is hereby revoked.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes; to obtain the most current information available, we suggest that you check, close to the time of shipment, *The Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF VOICE INTERFACE UNIT

AGENCY; U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a Voice Interface Unit. Notice of the proposed revocation was published on March 20, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 12.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 8, 1996.

FOR FURTHER INFORMATION CONTACT: Robert Altneu, Attorney-Advisor, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On March 20, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Number 12, proposing to revoke NY 810627, issued on May 22, 1995, which concerned the tariff classification of a Voice Interface Unit (VIU). No comments were received in response to the notice. Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NY 810627 to reflect the proper classification of VIU under subheading 8517.50.50, HTSUS, as telecommunication apparatus for carrier-current line systems or for digital line systems. HQ 958419 revoking NY 810627 is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: April 22, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 22, 1996.

CLA–2 RR:TC:MM 958419 RFA
Category: Classification
Tariff No. 8517.50.50

MR. JERRY KILLION
MANAGER, OPERATIONS SUPPORT
SANYO MANUFACTURING CORPORATION
2001 Sanyo Avenue
San Diego, CA 92173

Re: Voice Interface Unit (VIU); telecommunication apparatus for carrier-current line systems or for digital line systems; electrical machines and apparatus not specified elsewhere; Headings 8517 and 8543; EN 85.17(III); NY 810627, revoked.

DEAR MR. KILLION:

This is in response to your letter dated July 24, 1995, requesting reconsideration of NY 810527, issued by the Area Director of Customs, New York Seaport, on May 22, 1995, to Porter International, Inc., on behalf of Sanyo Manufacturing Corporation. In NY 810627, Customs determined the tariff classification of the Voice Interface Unit (VIU) under the Harmonized Tariff Schedule of the United States (HTSUS). Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (1993), notice of the proposed revocation of NY 810627 was published on March 20, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 12. No comments were received in response to the notice.

Facts:

The merchandise, labeled as the Voice Interface Unit (VIU), is the interface between the in-home telephone equipment and the digital telephone network, the FPN 1000 System. The FPN 1000 System is a flexible and cost-effective way to provide customers with telephone service over coaxial cable networks- the same networks used to deliver conventional analog or compressed digital video programming. The end-user will be able to make local and long-distance telephone calls through the VIU and the FPN 1000 System. This system is suited for cable network hubs and Fiber To The Feeder (FTTF) serving areas of 200 to 2,000 subscribers. All communications are transmitted over a single broadband distribution system using fiber/coaxial cable technology. Telephone, data, and video occupy separate radio frequency (RF) channels. The network backbone is organized architecturally as independent high speed parallel buses. The feeder from the fiber hub is a standard cable television tree and branch mixed fiber/coaxial cable distribution network to the home. The VIU connects to the cable network receiving and transmitting signals.

The VIU supports standard DTMF or pulse dial telephones, modems, or FAX machines. The VIU converts the analog signal from the telephone equipment to a digital signal with which it time division multiplexes and pulse code modulates its RF transmit signal (inbound to the headend). It likewise demultiplexes and demodulates the outbound signals from the headend which are in its time slot and converts them to analog "voice" signals. A built-in auxiliary port facilitates the connection of data and video equipment to the VIU.

Issue:

Is the VIU classifiable as telecommunication apparatus for carrier-current line systems or for digital line systems, or as other electrical machines and apparatus not specified elsewhere, under the HTSUS?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

In NY 810627, dated May 22, 1995, Customs determined that the VIU was classifiable under subheading 8517.81.00 (now subheading 8517.80.10) HTSUS, as other telephonic apparatus. You indicate that the VIU should be classifiable under subheading 8543.80.60

(now subheading 8543.89.60), HTSUS, because the VIU is specifically designed for connection to a telephone apparatus and a telephone network. Subheading 8543.89.60, HTSUS, provides for: "[e]lectrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter * * *: [o]ther machines and apparatus: [o]ther [a]rticles designed for connection to telegraphic or telephonic apparatus or instruments or to telegraphic or telephonic networks * * *."

To be classifiable under heading 8543, HTSUS, the VIU must not be described in any other heading within chapter 85, HTSUS. In 1996, the HTSUS amended Heading 8517, HTSUS, to provide for telecommunication apparatus for carrier-current line systems or for digital line systems.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the HTSUS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T. D. 89–80, 54 FR 35127, 35128 (August 23, 1989). EN 85.17, page 1363, states as follows:

(III) APPARATUS FOR CARRIER-CURRENT LINE SYSTEMS OR FOR DIGITAL LINE SYSTEMS

> These systems are based on the modulation of an electrical carrier-current or of a light source by analogue or digital signals. Use is made of the carrier-current modulation technique and pulse code modulation (PCM) or some other digital system. These systems are used for the transmission of all kinds of information (words, data, images, etc.)
>
> These systems include all categories of multiplexers and related line equipment for metal or optical-fibre cables. "Line equipment" includes transmitters and receivers or electro-optical converters. [Combined modulators-demodulators (modems) are also classified here.]

The VIU modulates the voice signals from analog to digital and from digital to analog when it receives and transmits audio signals from the telephone to the cable network/line equipment. The principal purpose of the VIU is to provide telephonic communication over existing cable line networks. Therefore, we find that the VIU is classifiable under heading 6517, HTSUS, as telecommunication apparatus for carrier current line systems or for digital line systems. Because the VIU meets the terms of heading 8517, HTSUS, as telecommunication apparatus, classification under heading 8543, HTSUS, is precluded.

Holding:

The VIU is classifiable under subheading 8517.50.50, HTSUS, which provides for: "[e]lectrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones * * *: [o]ther apparatus, for carrier-current line systems or for digital line systems: [o]ther: [t]elephonic * * *." The general, column one rate of duty is 8.6 percent *ad valorem*.

Effect on Other Rulings:

NY 810627, dated May 22, 1995, is hereby revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION/REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF BARN CLEANER REPLACEMENT CHAIN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification/revocation of tariff classification ruling letters

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying one ruling and revoking another relating to the tariff classification of barn cleaner replacement chain. The merchandise is a type of chain consisting of alternating links and paddles which are joined together in a hook-and-eye arrangement, with iron or steel shapes or paddles welded to the chain at regular intervals. Chains of this type operate in continuous rotation in dairy barns in connection with a motor, drive shaft and clutch pulley, to sweep away animal waste. Notice of the proposed modification/revocation was published on February 28, 1996, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 8, 1996.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 28, 1996, Customs published a notice in the CUSTOMS BULLETIN Volume 30, Number 9, proposing to modify one ruling and revoke another relating to the classification of certain barn cleaner replacement chain in a hook-and-eye arrangement with iron or steel shapes or paddles welded at regular intervals. No comments were received in response to this notice. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat, 2057), this notice advises interested parties that Customs is modifying *NY* 830398, dated October 19, 1988, to reflect the proper classification of the subject chain in subheading 7315.89.50, HTSUS, a provision for other chain. Customs is also revoking *HQ* 088358, dated March 1, 1991, to reflect that the subject barn cleaner replacement chain is eligible for duty-free entry under heading 9817.00.60, HTSUS, as parts to be used in articles provided for in heading 8436, among other headings, if otherwise qualified. *HQ* 958875 is set forth as the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: April 17, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 17, 1996.

CLA–2 RR:TC:MM 958875 JAS
Category: Classification
Tariff No. 7315.89.50 and 9817.00.60

MR. JOHN CANTWELL
A.N. DERINGER, INC.
PO. Box 43, Rt. 37
Massena, NY 12937–0624

Re: *NY* 830398 modified, *HQ* 088358 revoked; barn cleaner replacement chain; iron or steel hook-and-eye chain with welded paddles; articulated chain, other chain; Heading 9817.00,60, parts to be used in articles provided for in Heading 8436, *HQ* 088999; Chapter 98, U.S. Note 2(ij).

DEAR MR. CANTWELL:

In *NY* 830398, dated October 19, 1988, issued to your company on behalf of **Husky Farm Equipment, Ltd.,** the Area Director of Customs, New York Seaport, held, among other things, that certain barn cleaner replacement chain in a hook-and-eye arrangement was classifiable as other articulated link chain, in subheading 7315.12.00, Harmonized Tariff Schedule of the United States (HTSUS). The ruling also held that the chain was eligible for duty-free entry under heading 9817.00.60, HTSUS, as parts to be used in articles of headings 8432, 8433, 8434 and 8436, HTSUS. Subsequently, *HQ* 088358, dated March 1, 1991, modified *NY* 830398 by holding the chain was not eligible for duty-free entry under heading 9817.00.50, HTSUS, as machinery, equipment and implements to be used-for agricultural or horticultural purposes because of a Chapter 96 legal note that excluded, with certain limited exceptions, goods of Chapter 73.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of a proposal to modify *NY* 830398 and revoke *HQ* 088358 was published on February 28, 1998, in the CUSTOMS BULLETIN, Volume 30, Number 9. No comments were received in response to this notice.

Facts:

The barn cleaner replacement chain in a hook-and-eye arrangement, the subject of *NY* 830398, is iron or steel chain with each link having a J shape at one end and the other end looped or closed. Iron or steel shapes or paddles, each typically measuring 2 inches × 2 inches × ¼ inch, are welded to this chain at regular intervals. Chains of this type operate in continuous rotation in dairy barns in connection with a motor, drive shaft and clutch pulley to sweep away animal waste.

The provisions under consideration are as follows:

7315	Chain and parts thereof, of iron or steel:
	Articulated link chain and parts thereof:
7315.12.00	Other chain * * * 3.4 percent *ad valorem*
	Other chain:
7315.89	Other:
7315.89.50	Other * * * 5.3 percent *ad valorem*
* * * * * * *	
9817.00.50	Machinery, equipment and implements to be used for agricultural or horticultural purposes * * * Free
9817.00.60	Parts to be used in articles provided for in headings 8432, 8433, 8434 and 8438, whether or not such parts are principally used as parts of such articles and whether or not covered by a specific provision within the meaning of additional U.S. Rule of Interpretation 1(c) * * * Free

Issue:

Whether hook-and-eye chain with paddles is articulated link chain for tariff purposes; whether this chain is eligible for duty-free entry under heading 9817.00.50 or under heading 9817.00.60.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Where not defined in a section or chapter legal note, or in the **Harmonized Commodity Description and Coding System Explanatory Notes (ENs),** tariff terms are construed according to their common and commercial meanings which are presumed to be the same. The term ***articulated,*** for purposes of subheading 7315.12.00, is not defined in the HTSUS or in the heading 73.15 **ENs.** In common meaning, the term relates to articles with segments united by joints such as pins. The links of hook-and-eye chain are united by looping the J end of one link through the closed end of another link. Such chain is not articulated for tariff purposes. It is classifiable in subheading 7315.89.50, HTSUS, as other chain.

As stated in *HQ* 088358, to be eligible for duty-free entry under heading 9817.00.50, a good must not be excluded by a U.S. legal note in Chapter 98, Subchapter XVII; it must be an article that performs the agricultural or horticultural pursuit in question; and the good must have the required actual use certificate. Chapter 98, U.S. Note 2(ij), precludes articles of Chapter 73 from classification in heading 9817.00.50. However, Note 2(ij) further states that articles provided for in subheadings 7315.81 through 7315.89, among other subheadings, are not subject to this exclusion.

The barn cleaner replacement chain is a part or component of apparatus used to remove manure from dairy barns. It is not machinery, equipment and implements for purposes of heading 9017.00.50; rather, it is a part for tariff purposes and is eligible for classification in heading 9817.00.60, if otherwise qualified. An importation of barn cleaner replacement chain, as described, plus motor, drive shaft, and clutch pulley, imported assembled or unassembled, would be considered agricultural machinery of heading 8436. This is because the removing of animal wastes and other noxious materials from dairy barns for health or sanitary reasons bears a sufficient relationship to the care and maintenance of livestock as to qualify as a legitimate agricultural pursuit for tariff purposes. *HQ* 088999, dated October 15, 1991. The barn cleaner replacement chain, therefore, qualifies as a part to be used in articles provided for in heading 8436. It is eligible for classification in heading 9817.00.60, HTSUS, upon compliance with the actual use requirements of 10 CFR 10.138.

Holding:

Under the authority of GRI 1, barn cleaner replacement chain in a hook-and-eye arrangement, with paddles, as described, is provided for in heading 7315. It is classifiable in subheading 7315.89.50, HTSUS, Articles classifiable in this provision are eligible for duty-free entry under heading 9817.00.60, HTSUS, upon compliance with applicable law and Customs Regulations.

Effect on Other Rulings:

NY 830398, dated October 19, 1988, is hereby modified, and *HQ* 088358, dated March 1, 1991, is hereby revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION/REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF TOOL BLANKS AND CUTTER BLANKS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Modification/revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying one ruling and revoking another relating to the tariff classification of tool blanks and cutter blanks. These articles consist of synthetic diamond fragments bonded to a tungsten carbide substrate. After importation, they will be attached to a body or shank to form a complete tool for drilling and mining applications. Notice of the proposed modification/revocation was published on March 20, 1996, in the CUSTOMS BULLETIN. No comments were received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 8, 1996.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On March 20, 1996, Custom, published a notice in the CUSTOMS BULLETIN, Volume 30, Number 12, proposing to modify *HQ* 081535, dated June 21, 1989, and revoke *DD* 873390, dated May 1, 1992. Both rulings classified the tool blanks and cutter blanks as other rock drilling or earth boring tools, in subheading 8207.12.60, HTSUS. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat.

2057), this notice advises interested parties that Customs is modifying *HQ* 081535 and revoking *DD* 873390 to reflect the proper classification of the merchandise in subheading 7116.20.50, HTSUS, a provision for other articles of precious or semiprecious stones. Goods so classified are eligible for free entry under subheading 9907.71.01, HTSUS, as tool blanks and drill blanks of industrial diamonds. *HQ* 958704 modifying *HQ* 081535 is set forth as Attachment "A" to this document, *HQ* 958293 revoking *DD* 873390 is set forth as Attachment "B" to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: April 23, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 23, 1996.

CLA–2 RR:TC:MM 958704 JAS
Category: Classification
Tariff No. 7116.20.50/9907.71.01

FREDERICK L. IKENSON, ESQ.
1621 New Hampshire Avenue, N.W.
Washington, DC 20009

Re: *HQ* 081535 modified; diamond drill blanks; polycrystalline diamond fragments bonded to tungsten carbide substrate, tips for cutting tools; drilling or boring tools, Subheading 8207.12.60; articles of synthetic, precious or semiprecious stones, Heading 7116, essential character, GRI 3(b).

DEAR MR. IKENSON:

In *HQ* 081535, issued to you on June 21, 1989, on behalf of **General Electric Company,** we held that certain diamond drill blanks, among other articles, were classifiable in subheading 8207.12.60, Harmonized Tariff Schedule of the United States (HTSUS). Articles so classified were eligible for duty-free treatment under subheading 9902.71.04, HTSUS, a provision that no longer exists.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of *HQ* 081535 was published on March 20, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 12.

Facts:

HQ 081535 addressed the tariff status of diamond drill blanks, also referred to as polycrystalline diamond compact (PDC) blanks, among other articles. PDC blanks consist of a layer of randomly oriented synthetic industrial diamond crystals bonded to a tungsten carbide substrate. They are used in the manufacture of drill bits for oil, gas and mineral explo-

ration or for other mining applications. *HQ* 081535 held that the PDCs were classifiable in subheading 8207.12.60 (now 8207.19.60), HTSUS, as other rock drilling or earth boring tools.

The provisions under consideration are as follows:

7116	Articles of natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed):
7116.20	Of precious or semiprecious stones (natural, synthetic or reconstructed):
	Other:
7116.20.50	Other * * * 4 percent *ad valorem*/Free under subheading 9907.71.01, as tool blanks and drill blanks, of industrial diamonds (provided for in subheading 7116.20.50).
* * * * * * * *	
8207	Interchangeable tools for hand tools * * * or for machine tools; base metal parts thereof:
	Rock drilling or earth boring tools. and parts thereof:
8207.19	Other, including parts:
8207.19.60	Other * * * 3.4 percent

Issue:

Whether the PDC blanks are cutting tools of heading 8207.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 3(b) states in part that composite goods consisting of different materials or made up of different components which cannot be classified by reference to Rule 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criteria is applicable.

The **Harmonized Commodity Description And Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

As to the applicability of heading 8207, relevant **ENs** state, at. p. 1110, that the interchangeable tools of that heading may be either one-piece or composite articles. Composite tools consist of one or more working parts of base metal, of metal carbides or of cermets, of diamond or of other precious or semi-precious stones, attached to a base metal support, either permanently, by welding or insetting, or as detachable parts. In the latter case, the tools consist of a base metal body and one or more working parts (blade, plate, point) locked to the body by a device comprising, for example, a bridge plate, a clamping screw or a spring cotter-pin with, where appropriate, a chip-breaking lip. Throughout the schedule, the expression ***"base metals"*** means tungsten (wolfram), among others. **Section XV, Note 3, HTSUS**. The PDCs in *HQ* 081535 are composite tools consisting of synthetic diamonds bonded together under high temperature and pressure, and mounted on a substrate of tungsten carbide. Tungsten carbide is a man-made, inorganic compound, not a base metal. For this reason, the PDCs are not within the scope of the cited **ENs** and are not provided for in heading 8207.

In accordance with GRI 3, the PDC blanks are composite goods that are *prima facie* in classifiable in the following headings:

Heading 2849	Carbides, whether or not chemically defined;
Heading 7102	Diamonds, whether or not worked, but not mounted or set;
Heading 7104	Synthetic or reconstructed precious or semi-precious stones, whether or not worked or graded but not strung, mounted or set and,
Heading 7116	Articles of precious or semiprecious stones (natural, synthetic or reconstructed).

Each of these headings describes part only of the PDC blanks. There is no single heading that provides a specific description for these PDC blanks, in accordance with GRI 3(a). In accordance with Rule 3(b), they must be classified as if consisting of the material or component that gives them their essential character, insofar as this criteria is applicable. The **RULE 3(b) ENs,** at p. 4, state the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. In his case, the tungsten carbide provides the substrate on which the bonded diamond crystals are mounted and which permits attachment to the shank of the core bit. Its bulk and weight are clearly superior to the bonded diamond crystals. However, while cost or value information has not been provided, we are advised that the diamonds clearly predominate in value. Moreover, the synthetic crystalline diamonds provide the cutting surface of the core bit. They are more thermally stable than irregular small, mined diamonds which they were developed to replace. We conclude it is the diamond that imparts the essential character to the whole so that the PDCs must be classified as if consisting only of diamonds. Heading 7102 provides for diamonds while heading 7104 provides for synthetic precious or semi-precious stones. However, in this case, individual diamond crystals have been bonded together under heat and pressure into a cutting element, which is an "article" of diamond. We conclude that from among the competing provisions, heading 7116 provides the most specific description for the PDCs.

Holding:

Under the authority of GRI 3(b), the diamond drill blanks or PDCs are provided for in heading 7116. They are classifiable in subheading 7116.20.50, HTSUS. Articles classifiable in this provision are eligible for duty-free entry under subheading 9907.71.01, HTSUS, through the close of December 31, 2004.

HQ 081535, dated June 21, 1989, is hereby modified with respect to drill blanks of synthetic industrial diamond crystals bonded to a tungsten carbide substrate. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 23, 1996.

CLA–2 RR:TC:MM 958293 JAS
Category: Classification
Tariff No. 7116.20.50/9907.71.01

JAMES R. CANNON, ESQ.
STEWART AND STEWART
2100 M Street, N.W.
Washington. DC 20037

Re: *DD* 873390 revoked; cutter blank, polycrystalline diamond cutter; cutter blank of synthetic diamond bonded to tungsten carbide substrate, cutter blank for attachment to drill bit body; interchangeable tools for hand tools or for machine tools, Subheading 8207.12.60.

DEAR MR. CANNON:

In *DD* 873390, issued to **Camco International, Inc.,** on May 1, 1992, the District Director of Customs, San Juan, Puerto Rico, held that certain cutter blanks for drill bits were classifiable as interchangeable tools for hand tools or for machine tools.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of *DD* 873390 was published on March 20, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 12.

Facts:

The merchandise in *DD* 873390 is a polycrystalline diamond compact (PDC) cutter blank. It consists of synthetic diamond bonded to a tungsten carbide substrate. After importation, the cutter blank will be completed into a cutting tool by insertion into preformed holes in a drill bit body or shank. The ruling held that, as imported, these articles were classifiable in subheading 8207.12.60 (now 8207.19.60), Harmonized Tariff Schedule of the United States (HTSUS), a provision for other rock drilling or earth boring tools, and parts thereof.

The provisions under consideration are as follows:

7116	Articles of natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed):
7116.20	Of precious or semiprecious stones (natural, synthetic or reconstructed);
	Other:
7116.20.60	Other * * * 4 percent *ad valorem*/Free under subheading 9907.71.01, as tool blanks and drill blanks, of industrial diamonds (provided for in subheading 7116.20.50).
* * * * * * *	
8207	Interchangeable tools for hand tools * * * or for machine tools; base metal parts thereof:
	Rock drilling or earth boring tools, and parts thereof:
8207.19	Other, including parts:
8207.19.60	Other * * * 3.4 percent

Issue:

Whether the PDC blanks are cutting tools of heading 8207.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 3(b) states in part that composite goods consisting of different materials or made up of different components which cannot be classified by reference to Rule 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criteria is applicable.

The **Harmonized Commodity Description And Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

As to the applicability of heading 8207, relevant **ENs** state, at. p. 1110, that the interchangeable tools of that heading may be either one-piece or composite articles. Composite tools consist of one or more working parts of base metal, of metal carbides or of cermets, of diamond or of other precious or semi-precious stones, attached to a base metal support, either permanently, by welding or insetting, or as detachable parts. In the latter case, the tools consist of a base metal body and one or more working parts (blade, plate, point) locked to the body by a device comprising, for example, a bridge plate, a clamping screw or a spring cotter-pin with, where appropriate, a chip-breaking lip. Throughout the schedule, the expression ***"base metals"*** means tungsten (wolfram), among others. **Section XV, Note 3, HTSUS.** The PDCs in *HQ* 081535 are composite tools consisting of synthetic diamonds bonded together under high temperature and pressure, and mounted on a substrate of tungsten carbide. Tungsten carbide is a man-made, inorganic compound, not a base metal. For this reason, the PDCs are not within the scope of the cited **ENs** and are not provided for in heading 8207.

In accordance with GRI 3, the PDC blanks are composite goods that are *prima facie* classifiable in the following headings:

Heading 2849	Carbides, whether or not chemically defined;
Heading 7102	Diamonds, whether or not worked, but not mounted or set;
Heading 7104	Synthetic or reconstructed precious or semi-precious stones, whether or not worked or graded but not strung, mounted or set; and,
Heading 7116	Articles of precious or semiprecious stones (natural, synthetic or reconstructed).

Each of these headings describes part only of the PDC blanks. There is no single heading that provides a specific description for these PDC blanks, in accordance with GRI 3(a). In accordance with Rule 3(b), they must be classified as if consisting of the material or component that gives them their essential character, insofar as this criteria is applicable. The **RULE 3(b) ENs,** at p, 4, state the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. In this case, the tungsten carbide provides the substrate on which the bonded diamond crystals are mounted and which permits attachment to the shank of the core bit. Its bulk and weight are clearly superior to the bonded diamond crystals. However, while cost or value information has not been provided, we are advised that the diamonds clearly predominate in value. Moreover, the synthetic crystalline diamonds provide the cutting surface of the core bit. They are more thermally stable than irregular small, mined diamonds which they were developed to replace. We conclude it is the diamond that imparts the essential character to the whole so that the PDCs must be classified as if consisting only of diamonds. Heading 7102 provides for diamonds while heading 7104 provides for synthetic precious or semi-precious stones. However, in this case, individual diamond crystals have been bonded together under heat and pressure into a cutting element, which is an "article" of diamond. We conclude that from among the competing provisions, heading 7116 provides the most specific description for the PDCs.

Holding:

Under the authority of GRI 3(b), the diamond drill blanks or PDCs are provided for in heading 7116. They are classifiable in subheading 7116.20.50, HTSUS. Articles classifiable in this provision are eligible for duty-free entry under subheading 9907.71.01. HTSUS, through the close of December 31, 2004.

DD 873390, dated May 1, 1992, is hereby revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF ORNAMENTAL MUSIC BOX

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of an ornamental music box. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before June 7, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington DC 20229. Comments submitted may be inspected at the Tariff ClassIfication Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington DC.

FOR FURTHER INFORMATION CONTACT: Mary Beth McLoughlin, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of an ornamental music box. Comments are invited on the correctness of the proposed ruling.

In Headquarters Ruing Letter (HRL) 950042, dated November 18, 1991, an ornamental music box with a bunny rabbit figurine was classified together with other ornamental articles, under subheading 6913.10.50, Harmonized Tariff Schedule of the United States (HTSUS), which provides, in pertinent part, for statuettes and other ceramic ornamental articles. HRL 950042 is set forth as "Attachment A" to this document.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be consulted. The ENs, although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUS and

are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989).

A strict reading of the ENs indicates that a music box which is essentially ornamental in function is excluded from classification as a music box under subheading 9208.10.00, HTSUS. However, Customs believes that the ENs are not dispositive concerning the classification of music boxes with figurines mounted on them. Based on judicial opinions, Customs practice, as set forth in several rulings is to classify such music boxes under subheading 9208.10.10, HTSUS, and item 725.50, Tariff Schedules of the United States (TSUS) (the precursor tariff provision to subheading 9208.10.00, HTSUS).

Customs intends to modify HRL 950042 to reflect the proper classification of the ornamental music box. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter (HRL) 958543 modifying HRL 950042 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: April 19, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, November 18, 1991.

CLA–2 CO:R:C:N 950042 KCC
Category: Classification
Tariff No. 6913.10.50

CUSTOMS INFORMATION EXCHANGE
Room 450
6 World Trade Center
New York, NY 10048–0945

Re: Porcelain bunny/rabbit figures, music box, and night light; GRI 1; heading 9208; EN 92.08; 088840; festive articles; heading 9505; EN 95.05; Additional U.S. Rule of Interpretation 1(a); EN 69.13; Additional U.S. Note 5(a), Chapter 69, Section XIII; 087038; 950413.

DEAR SIR:

This pertains to the double difference on electronic 6431 (entry number D20–00121212) concerning the tariff classification of porcelain bunny/rabbit figures, music box and night light under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). The information associated with this entry was forwarded to this office for a response.

Facts:

The merchandise under consideration consists of:

1) a 4¾ inch high porcelain rabbit (S–3008A);
2) 3½ inch high porcelain bunny pin box (S–3005);
3) ¾ inch high porcelain blue bow bunny (S–3042A);
4) 6 inch high porcelain egg night light (S–3007); and
5) 3½ inch high porcelain bunny music box (S–3006).

The importer, Acmate Supply Inc., entered the porcelain bunny/rabbit figures, items 1 through 4, under subheading 6913.10.50, HTSUSA, which provides for "Statuettes and other ornamental ceramic articles * * * Of porcelain or china * * * Other * * * Other," and the music box under subheading 9208.10.00, HTSUSA, which provides for "* * * Music boxes."

Customs personnel in Chicago are of the opinion that all of the merchandise under consideration is more properly classified under subheading 9505.90.60. HTSUSA, which provides for "Festive, carnival or other entertainment articles." This opinion is based on DD 861118 dated March 25, 1991, which classified a 3 inch porcelain Easter egg with a baby chick hatching from the center of the egg, with the chick's head and wing surrounded by a relief of painted flowers on the surface of the egg, as a festive article under subheading 9505.90.60, HTSUSA. The National Import Specialists in New York believe that Acmate supply Inc. properly entered the merchandise in question under subheading 6913.10.50 and 9208.10.00, HTSUSA.

Issue:

What is the proper tariff classification of the porcelain bunny/rabbit figures, music box and night light under the HTSUSA?

Law and Analysis:

The classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUSA, states in part that "for legal purposes classification shall be determined according to the terms of the headings of the tariff and any relative section or chapter notes * * *."

Heading 9208, HTSUSA, provides for "* * * Music boxes." Explanatory Note (EN) 92.08 of the Harmonized Commodity Description and Coding System (HCDCS) states that:

> Articles, which incorporate a musical mechanism but which are essentially utilitarian or ornamental in function (for example, clocks, miniature wooden furniture, glass vases containing artificial flowers, ceramic figurines) are not regarded as musical boxes within the meaning of this heading. These articles are classified in the same headings as the corresponding articles not incorporating a musical mechanism.

HCDCS. Vol. 4, p. 1562. The Explanatory Notes, although not dispositive, are to be looked to for the proper interpretation of the HTSUSA. 54 Fed. Reg. 35127, 35138 (August 23, 1989). We have previously held in Headquarters Ruling Letter (HRL) 089840 dated April 5, 1991, that piano and heart shaped music boxes made of antimony were essentially utilitarian or ornamental in function, and, therefore, were classified under subheading 8306.29.00. HTSUSA, which provides for statuettes and other ornaments of base metal, other, Similarly, the bunny music box is essentially ornamental in function. Therefore, it is not classifiable as a music box in heading 9208, HTSUSA. Classification must be found elsewhere.

Heading 9505, HTSUSA, provides for "Festive, carnival, or other entertainment articles." EN 95.05 states that heading 9505, HTSUSA, covers:

> (A) Festive, carnival or other entertainment articles which in view of their intended use are generally made of non-durable material. They include:
>
> (1) Decorations such as festoons, garlands, Chinese lanterns, etc., as well as various decorative articles made of paper, metal foil, glass fibre, etc., for Christmas trees (e.g., tinsel, stars, icicles), artificial snow, coloured balls, bells, lanterns, etc. Cake and other decorations (e.g., animals, flags) which are traditionally associated with a particular holiday are also classified here.
>
> (2) Articles traditionally used at Christmas festivities, e.g., artificial Christmas trees (these are sometimes of the folding type), nativity scenes, Christmas crackers, Christmas stockings, imitation yule logs.

HCDCS, Vol. 4, p. 1590.

Articles classifiable in Heading 9505, HTSUSA, tend to have no other function than decoration. Heading 9505, HTSUSA, is generally regarded as a use provision. Hence, Additional U.S. Rule of Interpretation 1(a) must be reviewed.

Additional U.S. Rule of Interpretation 1(a) indicates that:

> In the absence of special language or context which otherwise requires—
> (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

While the subject items are decorative, the porcelain bunny/rabbit figures as a class or kind of merchandise are not specifically holiday related; they can be used all year round and come in a wide variety of poses. Accordingly, the porcelain bunny/rabbit figures are not classified as festive articles in Heading 9505, HTSUSA. Classification must be found elsewhere.

Heading 6913, HTSUSA, provides for statuettes and other ornamental ceramic articles. EN 69.13 provides that this heading covers the following:

> Articles which have no utility value but are wholly ornamental, and articles whose only usefulness is to support or contain other decorative articles or to add to their decorative effect, e.g.:
> (1) Statues, statuettes, busts, haus or bas reliefs, and other figures for interior or exterior decoration; ornaments (including those forming parts of clock sets) for mantel pieces, shelves, etc., * * *

HCDCS, Vol. 3, p. 923. Additional U.S. Note 5(a), Chapter 69, Section XIII, HTSUSA, states that the terms *"porcelain," "china"* and *"chinaware"* embrace ceramic ware * * *." As the bunny/rabbit figures, music box and night light are porcelain products, they are regarded as ceramic ware.

We are of the opinion that the bunny/rabbit figures and music box are ornamental and decorative. They have no utility value and are wholly ornamental. Heading 6913, HTSUSA, is the appropriate heading for the figures and music box. Additionally, heading 6913, HTSUSA, is the appropriate heading for the porcelain egg night light. HRL 087038 dated August 7, 1990, held that artificial flowers within which light bulbs are placed are composite goods pursuant to GRI 3(b) with the essential character imparted by the artificial flowers and, therefore, are properly classified under heading 6702, HTSUSA, which provides for artificial flowers. *See also,* HRL 950413 dated October 10, 1991, which held that a ceramic house with light was properly classified under subheading 6913.10.15, HTSUSA. inasmuch as the figures, music box and night light are wade of porcelain, they are properly classified in subheading 6913.10.50, HTSUSA.

Holding:

The porcelain bunny/rabbit figures, music box and night light are properly classified under subheading 6913.10.50, HTSUSA, which provides for "Statuettes and other ornamental ceramic articles * * * Of porcelain or china * * * Other * * * Other."

JOHN DURANT
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:MM:958543 MMC
Category: Classification
Tariff No. 9208.10.00

MR. ROGER SILVESTRI
DIRECTOR, NATIONAL COMMODITY SPECIALIST DIVISION
U.S. CUSTOMS SERVICE
6 World Trade Center, Rm 423
New York, NY 10048

Re: Porcelain bunny rabbit figurines mounted on music box: reconsideration of HRL 950042: EN 92.08; HRLs 086166, 087132, 953049, 952615, 952595, 952604, 9526067, 952609, 082738, 087316, 953536, 952643, 955574, 081657 and 072786; Bureau Letter 491.62; *Pukel v. U.S., Amico v. U.S.*

DEAR MR. SILVESTRI:

In Headquarters Ruling Letter (HRL) 950042 dated November 18, 1991, a porcelain figurine of bunny rabbits and an egg mounted on a music box was determined to be classifiable, together with other articles, under subheading 6913.10.50, Harmonized Tariff Schedule of the United States (HTSUS), provides for statuettes and other ornamental ceramic articles of porcelain or china. After review of HRL 950042, we now believe that the porcelain figurine music box is classifiable under subheading 9208.10.00, HTSUS, which provides for music boxes.

Facts:

The article is a porcelain figurine of two bunny rabbits and an egg mounted on a music box. It measures 3½″ high.

Issue:

Is the porcelain figurine of two bunny rabbits and an egg mounted on a music box classifiable as a porcelain statuette under heading 6913, HTSUS, or as a music box under heading 9208, HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

GRI 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires. The subheadings under consideration are as follows:

6913.10.50	Statuettes and other ornamental ceramic articles: of porcelain or china: other: other
9208.10.00	Music boxes, fairground organs, mechanical street organs, mechanical singing birds, musical saws and other musical instruments not falling within any other heading of this chapter; decoy calls of all kinds; whistles, call horns and other mouth-blown sound signaling instruments: music boxes.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be consulted. The ENs, although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989). EN 92.08 (pgs. 1561–1562) states, in pertinent part, that musical boxes:

> * * * consist of small mechanical movements playing tunes automatically, incorporated into boxes or various other containers. The main component is a cylinder set

with pins (according to the notes of the tune to be played); on rotating, the pins contact metal tongues arranged like the teeth of a comb, causing them to vibrate and produce the notes. The components are mounted on a plate and the cylinder is rotated either by a spring-operated (clockwork) motor which is wound with a key or directly by a handle. In some types, the cylinder may be replaced by a sheet-metal disc made on the hill and dale principle * * *

* * * Articles which incorporate a musical mechanism but which are essentially utilitarian or ornamental in function (for example, clocks, miniature wooden furniture, glass vases containing artificial flowers, ceramic figurines) are not regarded as musical boxes within the meaning of this heading. These articles are classified in the same headings as the corresponding articles not incorporating a musical mechanism * * *

EN 92.08 indicates that a music box that is either essentially utilitarian or ornamental in function is excluded from classification as a music box under subheading 9208.10.00, HTSUS.

Based on a series of rulings and the language of the ENs, Customs has consistently held that articles with both a utilitarian and music box function are excluded from classification under subheading 9208.10.00, as music boxes. See: Headquarters Ruling Letter (HRL) 086166 dated April 9, 1990, which excluded articles containing a music box/storage compartment from classification as music boxes. See also: HRLs 087132 dated August 12, 1992, 953049 dated February 17, 1993, and 952615, 952595, 952604 , 952607, and 952609 all dated December 2, 1992, which excluded dolls containing music boxes from classification as music boxes. Finally see: 082738 dated February 8, 1990, 087316 dated July 7, 1990, 953536 dated July 13, 1993, and 952643 dated January 11, 1993, all excluding various toys from classification as music boxes.

A strict reading of the ENs indicates that a music box which is essentially ornamental in function is excluded from classification as a music box under subheading 9208.10.00, HTSUS. However, Customs believes that the ENs are not dispositive concerning the classification of music boxes which are essentially ornamental in function. Rather, Customs practice is to classify such music boxes under subheading 9208.10.10, HTSUS, and item 725.50, Tariff Schedules of the United States (TSUS) (the precursor tariff provision to subheading 9208.10.00, HTSUS). This practice is based on two court cases which have ruled on the scope of the music box provision.

Pukel v. United States, 60 Cust Ct. 672, C.D 3497 (1968), defined a music box as a small mechanical movement playing tunes automatically, which is incorporated into a box, case or cabinet. The court stated that the musical mechanism by itself is not attractive and has little consumer appeal unless contained in an attractive box. For marketing purposes, the box is most often appropriately designed to conform to the song of the mechanism. *Amico v. United States*, 66 C.C.P.A. 5, C.A.D. 1214 (1978), held that dancing figurines enclosed in a plastic base containing a musical mechanism playing waltz tunes were classified as music boxes because the function of the figurines were solely that of design and appearance and as such were subordinate and incidental to the function of the music box. According to the court, the figurines served no function other than being decorative.

Additionally, the principles expressed in these two court cases have been applied in several Customs ruling letters. See; HRL 955574 dated June 3, 1994, classifying a music box with a ceramic see-sawing Santa, HRL 081657 dated December 1, 1988, classifying a ceramic carousel horse mounted on a wooden music box, HRL 072786 dated September 21, 1983, classifying two figures, a clown and a boy, derived from a Norman Rockwell Saturday Evening Post cover mounted on a music box, and Bureau Letter 491.62 of March 3, 1969, classifying a singing man mounted on a disc attached to a musical movement housed in a cylindrically shaped base that played the tune "Dominique" as a music box because it did nothing more than revolve and play music.

Congress has indicted that earlier tariff decisions must not be disregarded in applying the HTSUS. The conference report to the Omnibus Trade Bill of 1988, stated that "on a case-by-case basis prior decisions should be considered instructive in interpreting the HTS[US], particularly where the nomenclature previously interpreted in those decisions remain unchanged and no dissimilar interpretation is required by the text of the HTS[US]." H. Rep. No. 100–576, 100th cong., 2d Sess. 548, 550 (1988).

Customs believes that in this instance the ENs, are not dispositive. Rather, we find the HTSUS and TSUS rulings as well as the court cases to be persuasive. The main purpose of a music box is to entertain by playing music. Any ornamental article whose primary appeal is a music box feature and which otherwise meets the music box requirements, remains clas-

sifiable under heading 9208, HTSUS. Therefore, the two bunny rabbits and egg figurine mounted on a music box is classifiable under subheading 9208.10.10, HTSUS, as a music box.

Holding:

HRL 950042 is modified. The bunny rabbits and egg figurine mounted on a music box is classifiable under subheading 9208.10.10, HTSUS, as a music box with a column one duty rate of 3.2% *ad valorem*.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

PUBLIC VERSION

(Slip Op. 96–51)

ARISTECH CHEMICAL CORP., BASF CORP., AND STEPAN CO., PLAINTIFFS *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND GRUPO IDESA, S.A., DEFENDANT-INTERVENOR, AND REICHHOLD CHEMICALS, INC., DEFENDANT-INTERVENOR

Court No. 94–01–00032

[Plaintiffs challenge the International Trade Commission's preliminary negative determination of injury or threat of injury. *Held:* The preliminary negative determination of injury or threat of material injury is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and is accordingly upheld.]

(Decided March 11, 1996)

Ablondi, Foster & Sobin, p.c. (F. David Foster, Peter J. Koenig, and *Lauren D. Frank)* for plaintiffs.

Lyn M. Schlitt, General Counsel, United States International Trade Commission; *James A. Toupin,* Deputy General Counsel, United States International Trade Commission *(Robin L. Turner)* for defendant United States International Trade Commission.

Porter, Wright, Morris & Arthur (Leslie Alan Glick and *Richard J. Burke)* for defendant-intervenor, Grupo Idesa, S.A.

Dorsey & Whitney (M. Page Hall, II) for defendant-intervenor, Reichhold Chemicals, Inc.

OPINION

MUSGRAVE, *Judge:* Plaintiffs Aristech Chemical Corporation, BASF Corporation, and the Stepan Company ("Plaintiffs") contest the preliminary negative injury decision of the U.S. International Trade Commission ("ITC") in *Phthalic Anhydride From Mexico,* Inv. Nos. 701–TA–358 and 731–TA–667 (Preliminary), ITC Pub. 2709 (December 1993); 58 Fed. Reg. 65732 (December 16, 1993). Plaintiffs move pursuant to CIT Rule 56.2 for judgment upon the agency record. The Court has jurisdiction over this matter by way of 28 U.S.C. § 1581(c) (1988).

BACKGROUND

Plaintiffs filed their petition with the ITC and the Department of Commerce on October 22, 1993, alleging that an industry in the United

States was materially injured or threatened with material injury by reason of subsidized and less than fair value ("LTFV") imports of phthalic anhydride ("PA") from Mexico, as well as from Brazil, Israel, Venezuela, and by reason of LFTV imports from Hungary. After a 45-day preliminary investigation the ITC determined, by a 4–2 vote, that the United States PA industry was not materially injured or threatened with material injury by reason of Mexican imports. The ITC issued its negative preliminary determination on December 6, 1993, notice of which was published in the Federal Register, 58 Fed. Reg. 65732 (Dec. 16, 1993).

On November 30, 1993, the evening before the ITC voted, and five days before the preliminary negative determination was issued, counsel for Mexican producer Celanese Mexicana, S.A. ("Celanese") informed the ITC by telephone and by facsimile that Celanese would stop producing PA as of January, 1994. Celanese had previously indicated in a questionnaire response that its Mexican plant might be shut down, but also indicated that if the plant continued to operate, most of its exports would be directed to the United States. Admin. R., List No. 2, Doc. No. 31.29, Celanese Resp. at 5. The facsimile was not certified as accurate and complete to the best of the submitter's knowledge, nor were any of the other parties to the investigation served with a copy of the facsimile. Notwithstanding, the ITC staff apparently found the assertion of significance and pursued the matter. ITC staff contacted a major importer, which, the ITC says, confirmed that the Mexican plant would be closing. The ITC relied upon this information in reaching the 4–2 negative injury or threat of injury determination as a result of imports of PA from Mexico. *See, e.g.,* Admin. R., List No. 1, Doc. No. 96 at I–36.

STANDARD OF REVIEW

By statute, this Court shall hold unlawful any determination, finding, or conclusion of the ITC found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(A) (1988). Accordingly, the Court is to review the record for the relevant factors and consider whether there has been a clear error of judgment on the part of the ITC. The Court will not disturb the ITC determination so long as a rational basis exists for the choices made by the ITC. *Bowman Transportation, Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (quoting *Burlington Truck Lines v. United States*, 371, U.S. 156, 168 (1962)); *Connecticut Steel Corp. v. United States*, 18 CIT ____, ____, 852 F. Supp. 1061, 1064 (1994). Furthermore, decisions of the ITC are presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decisions. 28 U.S.C. § 2639(a)(1) (1988).

The ITC is charged with determining, based upon the best information available to it at the time of the determination, whether there is a reasonable indication that an industry is materially injured or threatened with material injury. 19 U.S.C. §§ 1671b(a)(1), 1673b(a)(1) (1988). A negative preliminary determination by the ITC of a reasonable indication of material injury or threat of material injury is permissible when

(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation. *American Lamb Co. v. United States,* 785 F.2d 994, 1001 (Fed. Cir. 1986).

DISCUSSION

While plaintiffs raise several points they consider to be errors on the part of the ITC, their most serious challenge seems to be that the ITC accepted and relied upon last minute information that a major producer of PA in Mexico had ceased production and closed its Mexican facility. Plaintiffs point out that this data was not open to rebuttal, was not certified, and was not received in time to be properly assessed, and further that the plant could later be re-opened, other Mexican producers could purchase the closed facility's equipment; thus plaintiffs reason, the ITC improperly relied on the notice received by them of the plant closing in its negative determination of threat of material injury by reason of imports of PA from Mexico.

Plaintiffs' concerns are not without merit, and were the matter before the Court *de novo,* a position different from that of the ITC might well have obtained. But that is not the posture in which the case rests. Congress intended application of a narrow judicial review standard. *American Lamb Co. v. United States,* at 1004. The statute, 19 U.S.C. § 1516a(b)(1)(A), provides that the Court shall overturn the determination, finding, or conclusion of the ITC if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." "If ITC's negative determination cannot be held defective on any of these grounds the court should not overturn it." *American Lamb,* 785 F.2d at 1004. The Court finds that the instant determination cannot be found defective on any of these grounds and therefore affirms it.

The record in this case reflects that the possibility of the Celanese plant closure was before the ITC during its investigation. And the plant was a significant factor in the production of PA in Mexico and its exportation to the US, accounting for [ ] percent capacity and [ ] percent of production. Admin. R., List No. 2, Doc. No. 26. When the ITC was advised of the closure, its consideration of that fact in reaching its negative determinations cannot be said to have been arbitrary and capricious, notwithstanding that one could have wished for a more thorough and public airing of the data. Even though the data was received by the ITC at the "eleventh hour," none of the parties to this action contest the veracity or accuracy of the report, but only the lack of opportunity to comment before the preliminary determination was reached. The ITC staff did make enquiry, and the transcript of the meeting at which the determination was reached reflects that the staff was advised that the closing seemed to be a matter of public knowledge. Admin. R., List No. 1, Doc. No. 78 at 5.

Given the time constraint under which the ITC labors to reach its preliminary determination, it was not capricious nor arbitrary to consider the new, important information concerning the plant closing. It is bound

to consider *all* information relating to the subject before it, and it was within the ITC's discretion to reach a preliminary negative determination based on the information before it, rather than speculating on plant re-openings, or other future possibilities, and rather than reaching a tenuous affirmative finding—which apparently the majority could not have done in good faith—or going to a final determination, which the majority obviously did not feel was justified.

Plaintiffs also raise concerns over the production capacity and capacity utilization data relied upon by the ITC. Plaintiffs point out that the figures relied upon by the ITC and Vice Chairman Watson erroneously included certain production figures of Mexican producer Sintesis in determining the capacity utilization rate for Mexican producers. Plaintiffs further claim that Vice Chairman Watson improperly concluded that Mexican producers can increase their capacity utilization by adding extra shifts. In addition, plaintiffs argue that the capacity utilization figures used by the ITC are contrary to the figures reported by other sources such as the Mexican government, the Mexican and Latin American chemical trade association, and independent industry experts. Plaintiffs claim these figures are the best information available which the ITC is required to use by law.

As to the latter of these concerns, the record reflects that the government, trade association, and industry data was before the ITC, which, "absent some showing to the contrary, * * * is presumed to have considered all evidence in the record" in making its determination. *Connecticut Steel,* 18 CIT at ____, 852 F. Supp. at 1065, (citing *Rhone Poulenc, S.A. v. United States,* 8 CIT 47, 55, 592 F. Supp. 1318, 1326 (1984)); *Torrington Co. v. United States,* 16 CIT 220, 224, 790 F. Supp 1161, 1167, *aff'd,* 991 F.2d 809 (Fed. Cir. 1993). The ITC is granted discretion in deciding which information is the best available for making its determination. *American Lamb,* 785 F.2d at 1003–1004. The Court is satisfied that the ITC has conducted its investigation consistent with its statutory mandate as set forth in 19 U.S.C. § 1677e(c) (1988). The Court therefore finds that the ITC's use of data other than that urged by plaintiffs was a reasonable exercise of its discretion under the statute.

Regarding the capacity utilization data erroneously calculated and the conclusions drawn from that data, the question for the Court is whether the ITC would have come to a different conclusion had the capacity utilization rate not been overstated. While the Court is not permitted to substitute its judgment for that of the ITC, *Bowman,* 419 U.S. at 285–86, (citing *SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)),* the Court also should not remand the preliminary determination unless it is in substantial doubt as to whether the ITC would reach the same conclusion. *See Lynnwood Campbell v. Merit Systems Protection Bd.,* 27 F.3d 1560, 1570 (Fed Cir. 1994), (citing *NLRB v. Reed & Prince Mfg. Co.,* 205 F.2d 131, 139 (1st Cir. 1953)). Indeed this Court in the past has affirmed ITC determinations which were based in part upon erroneous information. *See Bando Chemical Industries, Ltd. v. United States,* 17 CIT 798,

807 (1993); *Torrington Co. v. United States,* 14 CIT 648, 654, 747 F. Supp 744, 751 (1990), *aff'd,* 938 F.2d 1278 (Fed Cir. 1991); *and Roses Inc. v. United States,* 13 CIT 662, 668–69, 720 F. Supp. 180, 185 (1989). Although the information relied upon in the given case was erroneous, there is information in the record which nonetheless supports the ITC's conclusion regarding capacity utilization rates. For example, Celanese's representative testified at the ITC conference that "Mexican industry is operating at a high capacity utilization level, averaging [ ] percent in 1992, indicating very little room for growth." Admin R., List No. 1, Pub. Doc. No. 45 at 75. Furthermore, the corrected data reveals capacity utilization rates in the range of [74–92] percent. Pls.' Br. at 11a. The Court is not, therefore, in substantial doubt as to whether the ITC would have reached the same conclusion, and accordingly finds that the ITC and Vice Chairman Watson had a rational basis for their conclusions regarding capacity utilization.

Plaintiffs assert that there is no factual basis in the record for Vice Chairman Watson's conclusion that the plant closure would affect exports to the U.S., either by causing such exports to decline, or to increase insignificantly. Pls.' Br. at 14–15.

Subsection 1677(F)(i)(III) requires the ITC to consider "any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level." In analyzing subsection 1677(F)(i)(III), Vice Chairman Watson relied upon at least two facts in concluding that it is not likely that imports will increase to an injurious level. He pointed to the imminent Celanese plant closure, and further pointed out that although market share had increased throughout the period of investigation, Mexican producers' market share never exceeded [ ] percent of apparent U.S. consumption. Admin. R., List No. 1, Doc. No. 96 at I–36. Although such data is subject to interpretation, when imports in both the past and present do not amount to material injury despite significantly greater production capacity than will exist in the future, such a conclusion is rationally supported. Accordingly, the Court finds that the information Vice Chairman Watson relied upon rationally serves as a basis for both his conclusion that there is no likelihood that penetration will increase to an injurious level.

Plaintiffs argue that Vice Chairman Watson failed to consider the [ ] demand for Mexican PA shipments in markets other than the U.S., and a corresponding [ ] of imports into the U.S., and that failure to consider this "relevant" factor amounts to an unlawful abuse of discretion and is not in accordance with the statutory requirement of using best information available. Pls.' Br. at 16.

Section 1677(F)(i)(VII) requires the ITC to consider "any other demonstrable adverse trends that indicate the probability that the importation * * * will be the cause of actual injury." Plaintiffs argue that "[n]o reasoning can be discerned by which this trend would not be considered an adverse trend. The only possible conclusion is that this adverse trend was not considered." Pls. Br. at 16. Although plaintiffs'

assessment may be correct inasmuch as this information could be construed as an adverse trend, it is clear that plaintiffs' argument fails to consider an essential corresponding portion of the statute: that such adverse trend indicates the probability that importation will be the cause of actual injury. As previously discussed, the ITC is presumed to have considered all of the record before it, absent a showing to the contrary. Furthermore, the ITC's path need only reasonably be discerned. *Bowman,* 419 U.S. at 286, (citing *Colorado Interstate Gas Co. v. FPC,* 324 U.S. 581, 595 1945). Vice Chairman Watson concluded that "[t]here are no 'other demonstrable adverse trends' that indicate that imports will be the cause of actual injury." Admin. R., List No. 1, Doc. No. 96 at I–36. He thus considered the requirement of cause of actual injury, although not the probability of such. Nonetheless, his path is reasonably discernible from previously discussed facts, not the least of which is the Celanese plant closure. Accordingly, Vice Chairman Watson's immediate conclusion regarding adverse trends has a rational basis in the record.

For the above reasons, plaintiffs' remaining arguments concerning certain "other" factors set forth in their brief at 16–19, are without merit.

CONCLUSION

The ITC preliminary negative determination in the above matter was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Therefore, this preliminary determination is affirmed.

(Slip Op. 96–63)

COMPANHIA PAULISTA DE FERRO-LIGAS AND SIBRA ELETRO SIDERURGICA BRASILEIRA S/A, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ELKEM METALS CO., DEFENDANT-INTERVENOR

Court No. 95–01–00068

[ITC determination sustained.]

(Dated April 15, 1996)

Willkie Farr & Gallagher (Christopher S. Stokes and *Edgar B. Miller)* replacing *Dorsey & Whitney L.L.P. (Munford Page Hall, II, Philippe M. Bruno, Linda P. Reppert,* and *Karen A. Zughaib)* for plaintiffs.

Lyn M. Schlitt, General Counsel, *James A. Toupin,* Deputy General Counsel, Office of the General Counsel, United States International Trade Commission, *(Shara L. Aranoff)* for defendant.

Baker & Botts, L.L.P. (William D. Kramer and *Clifford E. Stevens, Jr.)* for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter is before the court on a motion for judgment upon the agency record pursuant to USCIT Rule 56.2 by plaintiffs

Companhia Paulista De Ferro-Ligas and Sibra Eletro Siderurgica Brasileira S/A (collectively "Paulista" or "Paulista Group"). Plaintiffs contest the affirmative material injury determination by the United States International Trade Commission (the "Commission") in the antidumping investigation of silicomanganese from Brazil, the People's Republic of China ("PRC"), Ukraine, and Venezuela. *See Silicomanganese from Brazil, the People's Republic of China, Ukraine, and Venezuela,* USITC Pub. 2836, Inv. Nos. 731–TA–671–674 (Dec. 1994) (affirmative final determ.) *("Final Det.").* The Commission's affirmative material injury determination consists of a present material injury determination by Commissioners Rohr and Newquist and an affirmative threat of material injury determination by Chairman Watson. *See id.* at I–3. Plaintiffs contest only the affirmative material injury determination regarding imports from Brazil as unsupported by substantial evidence on the record or otherwise not in accordance with law.

BACKGROUND

Silicomanganese is a metallic, silvery ferroalloy used primarily as an additive in the production of steel. It provides a source of both manganese and silicon for advanced products in iron and steelmaking. *Id.* at I–6. On November 9, 1993, Elkem Metals Co. ("Elkem"), and the Oil, Chemical and Atomic Workers, Local 3–639, filed a petition with the International Trade Administration of the United States Department of Commerce ("Commerce") and the Commission alleging material injury or threat of material injury by reason of less than fair value ("LTFV") imports of silicomanganese from Brazil, the PRC, Ukraine, and Venezuela. Commerce published affirmative final determinations on November 7, 1994, finding that imports of silicomanganese from Brazil, the PRC, and Venezuela were being sold in the United States at less than fair value. *See Silicomanganese From Brazil,* 59 Fed. Reg. 55,432 (Dep't Comm. 1994) (final det.); *Silicomanganese From the People's Republic of China,* 59 Fed. Reg. 55,435 (Dep't Comm. 1994) (final det.); *Silicomanganese From Venezuela,* 59 Fed. Reg. 55,436 (Dep't Comm. 1994) (final det.). On December 6, 1994, Commerce published a final affirmative determination of LTFV sales for Ukraine. *Silicomanganese From Ukraine,* 59 Fed. Reg. 62,711 (Dep't Comm. 1994) (final det.). The Commission made affirmative determinations with respect to LTFV imports from Brazil, the PRC, and Ukraine, and a negative determination with respect to imports from Venezuela. *Final Det.* at I–3; *see also Silicomanganese From Brazil, the People's Republic of China, Ukraine, and Venezuela,* 59 Fed. Reg. 65,788 (USITC 1994). On December 22, 1994, Commerce issued its antidumping duty order with respect to silicomanganese from Brazil. *See Silicomanganese From Brazil,* 59 Fed. Reg. 66,003 (Dep't Comm. 1994).

STANDARD OF REVIEW

The court will hold unlawful those determinations of the Commission found to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

DISCUSSION

I. *Commissioners Rohr and Newquist's Determination:*

Commissioners Rohr and Newquist found one like product consisting of all silicomanganese and a domestic industry consisting of a single domestic producer, defendant-intervenor Elkem. *Final Det.* at I–7. They further determined that subject imports from the four countries should be cumulated for purposes of their material injury analysis.[1] *Id.* at I–15. Plaintiffs do not contest these findings.

In assessing whether the domestic industry was materially injured by reason of LTFV imports, the Commissioners considered relevant economic factors that had a bearing on the condition of the domestic industry. *Id.* at I–9. They found that competition in the domestic market was an important factor in their determination. *Id.* Specifically, the Commissioners found that a large number of importers participate in the U.S. silicomanganese market; more than a dozen non-subject countries export silicomanganese to the United States; demand for advanced types of steel increased over the period of investigation ("POI"), thereby resulting in an increase in the amount of silicomanganese required;[2] the combination of inelastic demand in response to price changes and a high level of competition in the market results in buyers switching purchases among suppliers rather than increasing the overall amount of silicomanganese sold; and finally, because of the increasing derivative demand for the product, the principal effect of the large number of suppliers is likely to be found in the overall price level. *Id.*

The Commissioners reasoned that the nature of competition in the market "forced Elkem to adopt a strategy of lowering price to meet the competition from the subject imports." *Id.* at I–11. They found that Elkem's financial performance deteriorated over the POI specifically, while Elkem earned a net profit in 1991, it suffered an operating loss in 1992 and in 1993 suffered losses at all levels. *Id.* Although these trends began to reverse in interim 1994, Elkem's silicomanganese operation remained unprofitable. *Id.* Accordingly, the Commissioners found that "the domestic industry is currently experiencing material injury." *Id.*

Paulista challenges Commissioners Rohr and Newquist's determination that the domestic industry was injured by reason of the cumulated LTFV imports. Specifically, plaintiffs dispute the Commissioners' findings that 1) the increase in the volume of subject imports caused injury to the domestic industry's market share; 2) despite a finding of a mixed

---

[1] Plaintiffs appeal only the determination of the Commission regarding imports from Brazil, but when used herein, the term "subject imports" refers to imports of silicomanganese from Brazil, the PRC, Ukraine, and Venezuela.

[2] The Commissioners found that demand for silicomanganese was or is driven largely by the level of steel production. Over the POI, "the demand for advanced types of steel increased significantly, thereby resulting in an increase in the amount of silicomanganese required." *Final Det.* at I–9.

pattern of overselling and underselling, there was "significant" price underselling; and 3) lost sales and revenues demonstrated a shift in sales from the domestic product to subject imports.

Defendant and defendant-intervenor Elkem counter that plaintiff's objections go the weight the Commissioners accorded the evidence supporting their analyses and the Commission has the discretion to weigh the relevant factors. They contend that Commissioners Rohr and Newquist's material injury determination is supported by substantial evidence and otherwise in accordance with law.

In determining whether a domestic industry is materially injured by reason of the imports under consideration, the Commission must consider:

> (I) the volume of imports of the merchandise which is the subject of the investigation,
>
> (II) the effect of imports of that merchandise on prices in the United States for like products, and
>
> (III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States.

19 U.S.C. § 1677(7)(B)(i) (1988). Pursuant to 19 U.S.C. § 1677(7)(B)(ii), the Commission may also consider "such other economic factors as are relevant to the determination." *Id.* No single factor, however, is determinative, and the Commission considers all relevant factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii) (1988).

A. *Volume of LTFV Imports:*

The Commission found that the absolute volume of cumulated subject imports rose "steadily and significantly," increasing from 60,260 tons in 1991 to 184,741 tons in 1993, and from 61,315 tons in interim 1993 to 64,313 tons in interim 1994 (January–June). *Final Det.* at I–15–I–16. They also found that cumulated imports substantially increased their share of domestic consumption during the POI. *Id.* at I–16. These findings are not contested by the parties.

Paulista points out that the relevant statute dictates that "[i]n evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is *significant.*" 19 U.S.C. § 1677(7)(C)(i) (1988) (emphasis added). Paulista contends that as Elkem's share of domestic consumption did not decrease, the Commissioners did not, and could not, find that the volume of imports was significant. According to Paulista, the evidence in the record shows that any increase in the volume of subject imports did not injure the domestic industry, but was at the expense of non-subject imports' domestic market share. Plaintiffs, thus, claim that substantial evidence in the record does not exist to support a finding that the volume of imports caused material injury to the domestic market.

Defendant admits that the Commissioners did not explicitly find that the volume of subject imports was significant, but maintains that such a finding is not legally required to support an affirmative material injury determination. Although the Commissioners did not discuss the domestic industry's market share, the Commission is presumed to have considered the entire record absent evidence to the contrary. *See Nippon Steel Corp. v. United States,* Slip Op. 95–57 at 39–40 (Apr. 3, 1995); *see also Torrington Co. v. United States,* 16 CIT 220, 224, 790 F. Supp. 1161, 1167 (1992) (stating "[t]he fact that certain information is not discussed in a Commission determination does not establish that the Commission failed to consider that information"), *aff'd,* 991 F.2d 809 (Fed. Cir. 1993). The Commissioners reasonably relied upon the evidence in the record that the volume of subject imports rose by over 200 percent and the importers' share of domestic consumption increased substantially to make an affirmative injury finding despite evidence of stable or increasing domestic market share. *Final Det.* at I–15–I–16; *Views of Commissioners David B. Rohr and Don E. Newquist* (Confidential Version) [hereinafter *"Rohr/Newquist Conf. Det."]* at 20–21. The Commissioners, moreover, repeatedly found the volume of imports to be a significant factor (without expressly stating so)[3] in their analyses of the conditions of competition in the industry, price trends, and the financial condition of the domestic industry. Volume is normally more significant where fungible goods are involved. *See USX Corp. v. United States,* 11 CIT 82, 85, 655 F. Supp. 487, 490 (1987) (noting that for fungible product impact of seemingly small import volumes is magnified in marketplace). The court, thus, finds that the Commissioners did not err in their consideration of the volume of cumulated imports.

B. *Price Underselling:*

Commissioners Rohr and Newquist made four findings in assessing the price of cumulated subject imports. First, they found that prices for both the domestic product and the subject imports declined over most of the POI, recovering somewhat in late 1993. *Final Det.* at I–16. Second, they noted the decline in the unit values of both the domestic product and the cumulated subject imports, while the unit values of non-subject imports remained relatively stable. *Rohr/Newquist Conf. Det.* at 21–22. The Commissioners, however, placed little weight on the rise in prices and unit values in interim 1994, reasoning that they were a reaction to the filing of the petition. *Final Det.* at I–16 & n.86. Third, they found that the price declines between 1991 and 1993 occurred simultaneously with the import surge. *Final Det.* at I–16. Finally, the Commissioners found that the record revealed "a mixed pattern of underselling and overselling." *Id.* The data showed 21 instances of underselling and 19 instances of overselling in the contract market and 8 instances of

---

[3] Although the Commission did not explicitly state that the volume of imports was significant, "[t]he Commission * * * is not required to make explicit findings with respect to all factors that it considers." *Negev Phosphates, Ltd. v. United States,* 12 CIT 1074, 1083, 699 F. Supp. 938, 947 (1988). The finding seems implicit throughout the opinion.

underselling and 5 of overselling in the spot market. *Id.* The parties do not dispute these findings.

In evaluating the effect of imports of merchandise on prices, the Commission shall consider whether—

> (I) there has been *significant* price underselling by the imported merchandise as compared with the price of like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii) (1988) (emphasis added).

Paulista argues that the Commissioners could not and did not find "significant" price underselling by the subject imports pursuant 19 U.S.C. § 1677(7)(C)(ii), as the pattern of underselling and overselling was mixed. Paulista also contends that, in the absence of significant price underselling, the Commissioners' finding that price underselling had a negative impact on the condition of the domestic industry" was not in accordance with law. Although Paulista concedes that the Commission may not be required to find price underselling in order to find adverse price effects, Paulista contends that once the Commissioners have considered whether there has been underselling, the statute requires it to be "significant" in order to support an affirmative material injury determination by reason of imports.

Defendant counters that Commissioners Rohr and Newquist never made a finding that price underselling had a negative impact on the condition of the domestic industry and points out that, in analyzing the effect of imports on domestic prices, the Commission must consider not only evidence of price undercutting, but also whether "the effect of imports of [subject] merchandise otherwise depresses prices to a significant degree." 19 U.S.C. § 1677(C)(ii).

The Commissioners found that imports did otherwise depress prices of domestic imports to a significant degree. *See Final Det.* at I–16–I–17. While Commissioners Rohr and Newquist found that the price underselling evidence was "mixed," in the case of both contract sales and spot sales, the subject imports undersold the domestic product in the majority of price comparisons. *Id.* at I–16. They found that the declining price of the LTFV imports, the increasing volume of the subject imports, the price-sensitive nature of competition, and the fungibility of silicomanganese combined to force Elkem to lower its prices and incur financial losses. *See id.* at I–15–I–17.

The Commission is not required to find significant price underselling to reach an affirmative material injury determination. *See Cemex, S.A. v. United States*, 16 CIT 251, 261, 790 F. Supp. 290, 299 (1992) (noting that "[t]o require findings of underselling would be inconsistent with the proposition that price suppression or depression is sufficient") *aff'd without op.*, 989 F.2d 1202 (Fed. Cir. 1993). The significance of the various factors affecting an industry necessarily depend upon the facts of

each case. *Copperweld Corp. v. United States,* 12 CIT 148, 156, 682 F. Supp. 552, 565 (1988) (quoting S. Rep. No. 249, 96th Cong., 1st Sess. 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474.) Congress recognized this in choosing to give the Commission broad discretion in analyzing and assessing the significance of the various factors affecting an industry. *Id.* The court finds that Commissioners Rohr and Newquist properly considered the price effects of the subject imports as required by the statute.

C. *Lost Sales and Lost Revenues:*

Commissioners Rohr and Newquist further found that the impact of the LTFV imports was demonstrated by an examination of the lost sales and lost revenue allegations. *Final Det.* at I–16. In particular, the Commissioners found that "end users seldom know or care to know the source of the silicomanganese they buy." *Id.* The Commissioners found that "the only thing purchasers consistently agree on is that price is a very important factor." *Id.* at I–17. They found specifically, that the effect of lower prices is "to shift sales from fairly priced domestic product and non-subject imports to unfair [subject] imports." *Id.* Commissioner Rohr also relied on "basic economic analysis" to support the conclusion that "the price and volume of imports have had significant negative effects on the domestic industry." *Id.* at I–16 n.97.

Paulista argues that the Commissioners improperly relied on lost sales and lost revenue allegations that Commission staff was unable to confirm as support for a finding that purchasers switched sales from the domestic product to subject imports. Paulista further contends that, in any event, the Commissioners' finding that purchasers switched sales from domestic products to subject imports is not supported by substantial evidence as subject imports gained market share at the expense of non-subject imports, not domestic products.

Defendant counters that the Commissioners did not rely on the unconfirmed lost sales and lost revenue allegations in the Commission's report as proof of the matters asserted. Rather, defendant contends that the Commissioners relied on the general lost sales discussion contained in the Commission Staff Report indicating that lost sales allegations could not be confirmed as purchasers are generally unable to identify the suppliers' country of origin. *Final Det.* at I–16–I–17. This information, defendant asserts, was the basis for the Commissioners' conclusion that silicomanganese is a fungible product sold primarily on the basis of price, without concern as to supplier source. *Id.*

Defendant further argues that the Commissioners did not find that purchasers switched suppliers from domestic products to subject imports, but found that the *effect* of declining prices would be to shift sales "from fairly priced domestic product *and non-subject imports* to unfair" subject imports. *See id.* at I–17 (emphasis added). Defendant points out that the Commissioners found that Elkem resisted ceding market share by competing with LTFV imports on price, *see id.* at I–11, and, thus, the Commissioners did find that the gain in market share to

subject imports was principally at the expense of non-subject imports, as Paulista contends.

Evidence of actual lost sales and lost revenues is not required to support a finding that the domestic industry is materially injured by reason of the subject imports. *See Acciai Speciali Terni, S.P.A v. United States,* Slip Op. 95–142, at 12 (August 7, 1995) (noting that Commission not required to rest its decision on lost sales or lost revenues, as these may be only possible signals of impact) (citation omitted). Although evidence of lost sales and revenue may be probative, the lack of such evidence ordinarily will not vitiate a Commission determination. *Stalexport v. United States,* Slip Op. 95–96, at 57 (May 23, 1995).

The court finds that the Commissioners did not base their affirmative material injury determination in any significant way on the impact of subject imports on the domestic industry based on lost sales and lost revenue allegations that could not be confirmed. The Commissioners considered the conditions of competition in the silicomanganese market, the increase in absolute volume of subject imports, the significant decline in prices for silicomanganese over the POI, and the worsening financial condition of the domestic industry as a result of the negative effects of price and volume in arriving at their affirmative material injury determination. Under the substantial evidence standard, the court must affirm the Commission's determination so long as it is reasonable and supported by the record as a whole, even if there is evidence which detracts from the Commission's conclusions. *See Atlantic Sugar, Ltd. v. United States,* 744 F.2d 1556, 1563 (Fed. Cir. 1984). Accordingly, the court finds that Commissioners Rohr and Newquist's affirmative material injury determination is supported by substantial evidence and is in accordance with law.

II. *Chairman Watson's Threat of Material Injury Determination:*

Chairman Watson determined that an industry in the United States is threatened with material injury by reason of LTFV imports of silicomanganese from Brazil. *Final Det.* at I–61. Chairman Watson found a single like product consisting of all silicomanganese and a single domestic producer, Elkem. *Id.* at I–22. Further, the Chairman concluded that imports from Brazil should not be cumulated with imports from any other country. *Id.* at I–61. The parties do not contest these findings.

For purposes of threat analysis, the Commission must consider, among other relevant economic factors:

> (II) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States,
>
> (III) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,
>
> (IV) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,

(V) any substantial increase in inventories of the merchandise in the United States,

(VI) the presence of underutilized capacity for producing the merchandise in the exporting country,

(VII) any other demonstrable adverse trends that indicate the probability that the importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury,

(VIII) the potential for product-shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation(s) under [19 U.S.C. § 1671 or § 1673] * * *, are also used to produce the merchandise under investigation,

* * * * * * *

(X) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.

19 U.S.C. § 1677(7)(F)(i) (1988).[4] The statute also requires that a threat of material injury determination must be based on evidence that the threat is real and that actual injury is imminent. 19 U.S.C. § 1677(7)(F)(ii) (1988). Such a determination may not be made on the basis of mere conjecture or supposition. *Id.*

Chairman Watson made affirmative findings regarding many of the enumerated factors. He noted that the likelihood of a significant increase in imports in the near future was evidenced by the increases in Brazilian silicomanganese production capacity and the substantial underutilized production capacity in Brazil. *Views of Chairman Watson on Threat of Material Injury by Reason of LTFV Imports from Brazil* (Confidential Version) [hereinafter *"Watson Conf. Det."*] at 2. The Chairman found that Brazil's role as a large silicomanganese supplier to the United States and the substitutability of Brazilian imports for domestic product indicated a probability that imports were likely to have a depressing or suppressing effect on domestic prices. *Final Det.* at I–62–I–63. He further found that importers' end-of-period inventories of Brazilian silicomanganese rose significantly and that inventories of Brazilian silicomanganese increased both absolutely and as a ratio to imports, U.S. shipments, and to total shipments during the POI. *Id.* at I–63. He found no potential for product-shifting and no present negative effects on the domestic industry's development and production efforts, but concluded that these findings did not detract from his affirmative threat finding. *Id.* In sum, Chairman Watson determined that the likelihood of adverse price effects on the domestic product in the near future resulting from the combination of these factors posed a real and imminent threat of material injury to the domestic industry. *Id.*

---

[4] Subsections (I) and (IX) deal with subsidies and raw agricultural products, respectively, and do not apply to this investigation. *See* 19 U.S.C. § 1677(7)(F)(i)(I), (IX).

A. *Absolute Volume of Imports:*

Paulista argues that Chairman Watson's reliance on absolute volume of imports rather than market penetration is not in accordance with law. Paulista points out that the statute requires the Commission to consider "any rapid increase in the United States market penetration and the likelihood that the penetration will increase to an injurious level." 19 U.S.C. § 1677(F)(i)(III). Paulista argues that "market penetration" is equivalent to "market share" and as the statute does not specifically require the Commission to consider the volume of imports, Chairman Watson's reliance on the increasing absolute volume of Brazilian imports, in lieu of Paulista's declining domestic market share, is not in accordance with law.

Defendant contends that the statutory term, market penetration, has never been defined so narrowly as to include only market share. Defendant claims that Chairman Watson reasonably interpreted "market penetration" to encompass a consideration of *both* absolute volume and domestic market share, considered both, and explained why he chose to rely on volume rather than market share data in the particular circumstances of this investigation. Chairman Watson stated that he "place[d] more weight on absolute volume changes as a predictor of future Brazilian presence in the United States market, since growing demand over the period of investigation attenuated significant redistribution of market share during the period of investigation." *Final Det.* at I–62. The court agrees that Paulista's narrow interpretation of the statutory term, market penetration, is untenable. The court finds that Chairman Watson, in choosing to rely on volume trend data to find the existence of a "rapid increase in market penetration" in the absence of rising market share, acted within his discretion to determine what weight to accord to the economic factors enumerated in the statute. *See Chung Ling Co., Ltd. v. United States,* 16 CIT 636, 648, 805 F. Supp. 45, 55 (1992) ('It is within the Commission's discretion to make reasonable interpretations of the evidence to determine the overall significance of any particular factor or piece of evidence.').

Paulista also contends substantial evidence does not exist in the record to support a finding that the absolute volume of imports from Brazil threaten material injury. In fact, Paulista asserts that Chairman Watson's finding that the increase in absolute volume of Brazilian imports from 1991 to 1993 would rise to an injurious level in the near future improperly ignores the evidence that the absolute volume of Brazilian imports declined between interim January–June 1993 and January–June 1994. Paulista points out an apparent contradiction between Chairman Watson's reliance on interim 1994 data in his present material injury analysis and his refusal to rely on such data for his threat of material injury determination.

Whether or not Chairman Watson should have placed even less weight on the interim data in the present material investigation, as Commissioners Rohr and Newquist did, his treatment of the data here

was proper. In his threat determination, the Chairman explained that he was not relying on interim 1994 volume data because they were

> inconsistent with Brazil's record of steady participation in the United States silicomanganese market over the period of investigation, the increases in Brazil's absolute volume of exports to the United States over the period of investigation, and Brazil's increases in silicomanganese production and production capacity over the period of investigation.

Watson Conf. Det. at 3 n.10; *compare Final Det.* at I–41 n.27. Thus, Chairman Watson determined that the trend of rising import volumes had not reversed permanently, despite interim 1994 data. This finding is not inconsistent with his earlier finding in the present injury context that the rising import volume had not caused present material injury, as subject imports had not yet taken significant market share from the domestic industry or had adverse price effects because of increasing demand during the POI. *Final Det.* at I–38. The Commission has discretion to weigh evidence from different time periods and to determine which evidence is more probative of threat of injury. *See Metallverken Nederland B.V. v. United States,* 14 CIT 481, 484, 744 F. Supp. 281, 284 (1990) (upholding discounting of interim data in a threat determination). Accordingly, the court finds Chairman Watson's reliance on import volume trends reasonable and supported by substantial evidence.

B. *Demonstrable Adverse Trends:*

Chairman Watson found that Brazil's status as one of the largest suppliers of silicomanganese imports to the United States throughout the POI and the single largest source of imported silicomanganese to the United States in 1993 (with 20.5 percent of total imports) constituted a "demonstrable adverse trend" indicating the probability that importation of Brazilian silicomanganese would be the cause of actual injury pursuant to 19 U.S.C. § 1677(F)(i)(VII). *Final Det.* at I–62. Paulista argues that such evidence is not evidence of a "demonstrable adverse trend" as Brazilian imports' gain in market share was not at the expense of the domestic industry during the POI and as the price underselling data for Brazilian imports does support a finding of threat of material injury.

Paulista's argument is without merit. Paulista mistakenly assumes that evidence relied on by the Commission as "any other demonstrable trends" must show actual present injury to the domestic industry. Chairman Watson found that Brazil's increasing volume of imports, making it the single largest source of imported silicomanganese to the Unites States, combined with other economic factors, such as declining shipments in Brazil, increases in Brazil's production capacity, and very low capacity utilization, reasonably demonstrates a probability that Brazilian imports will be a cause of actual injury in the near future. *See id.* at I–62 n.11.

C. *Production Capacity and Unused Capacity:*

Chairman Watson found that there was an increase in Brazilian production capacity from 1991 to 1993 and existing unused capacity during the same period. *Watson Conf. Det.* at 2. The Chairman rejected Paulista's claim that Brazil's production capacity was likely to decline in the future due to plant closings, a bankruptcy filing, and the planned transfer of ownership of certain facilities. *Final Det.* at I–61. The Chairman stated that he viewed "such claims as speculative given that the transfer of ownership has not yet occurred and that factual evidence of the events that [one exporter] claim[s] will result from the transfer has not been presented to the Commission." *Id.* Furthermore, the closings were likely to be of outmoded plants, which might simply make the producer more efficient while not affecting production significantly. *See* Tr. of Proceedings Before U.S. Int'l Trade Comm'n (Nov. 3, 1994), List 1, Doc. 97, at 163–64.

Paulista argues that production capacity and unused capacity data relied upon by Chairman Watson do not show an imminent threat of material injury. Paulista claims that the Chairman improperly relied on the data of one company, Sibra, as opposed to the data for the exporting country as a whole. *See* 19 U.S.C. § 1677(7)(F)(i)(II) (requiring Commission to examine "any increase in production capacity or existing unused capacity in the *exporting country*") (emphasis added). Paulista also asserts that Chairman Watson ignored the interim data for the most recent period (January–June 1993 as compared to January–June 1994), which show a substantial decline in Brazilian production capacity, and recent interim data showing that Brazil's capacity utilization increased in January–June 1994 over what it had been in January–June 1993, reducing the amount of unused capacity.

Defendant counters that Chairman Watson did not ignore Paulista's claim to be operating at full capacity during the POI. In his discussion of capacity utilization, the Chairman relied on a report compiled from Paulista and Sibra's own questionnaire responses. *See Final Det.* at I–61 n.2–n.5 (citing Conf. Staff Rep., tbl. 17, at I–67). The Commission Staff Report also reflects the fact that a director of Sibra testified at the Commission's hearing that Paulista Group's[5] theoretical capacity for production of silicomanganese, as reported to the Commission in its questionnaire responses, is never achieved, because part of that capacity is used for the production of other ferroalloys. Defendant contends that Chairman Watson considered and rejected this testimony. *See* Conf. Staff Rep., tbl. 17, at I–67.

The Chairman did choose to accept information submitted to the Commission by Elkem that Sibra is expected to nearly double silicomanganese output from 1993 to 1994 due to a full year's operation of a new plant, *Watson Conf. Det.* at 3 n.7, but this does not compel him to accept testimony that overall useful production capacity would decline significantly.

[5] The Paulista Group consists of Paulista and its subsidiary, Sibra.

The Commission is presumed to have considered the entire record. *See Hosiden Corp. v. United States,* 852 F. Supp. 1050, 1056 (Ct. Int'l Trade 1994). The court finds that Chairman Watson reasonably declined to rely on the Paulista Group's interim 1994 production capacity and unused capacity data and 1994–1995 projections as a predictor of the group's future conduct. The Chairman regarded the data as inconsistent with Paulista's pattern of conduct during the POI and concluded that the data could not be reconciled with other record evidence. *See Watson Conf. Det.* at 3 n.10. He found that between 1991 and 1993, expanding and underutilized capacity permitted Brazil to increase significantly its volume of exports to the United States and rise to the single largest source of silicomanganese imports in the United States market, while both exports to third country markets and home market consumption declined. *Watson Conf. Det.* at 1–2. The court finds that Chairman Watson acted within his discretion to weigh the evidence presented and accord it the significance he deemed proper as trier of fact. *See Maine Potato Council v. United States,* 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985) ("It is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence.").

D. *Increased Inventories:*

Chairman Watson found support for his threat determination based on the fact that "[i]mporters' end-of-period inventories of Brazilian silicomanganese rose significantly from 1991 to 1993 and between the 1993–94 interim periods," and that importers' inventories of Brazilian silicomanganese increased, both in absolute terms and as a ratio of imports, U.S. shipments, and total shipments over the POI. *Final Det.* at I–63. Paulista contests the Chairman's reliance on this data in light of the fact that domestic inventories of Brazilian imports which existed throughout the POI did not translate into an increase in Brazil's share of the domestic market, which declined during this period. On this basis, Paulista argues that its increased inventories cannot support a finding of an imminent and real threat of material injury. Paulista again ignores the price effects of the presence of the large volume of the fungible commodity in the market or in inventory.

The statute mandates the Commission to consider whether there had been "any substantial increase in inventories of the merchandise in the United States." 19 U.S.C. § 1677(7)(F)(i)(V). It does not require an isolated finding, as Paulista contends, "that such inventories would lead to imminent and real increased market penetration." Increased inventories can contribute to future material injury by increasing the volume of the product on the market or by suppressing or depressing prices even if held in inventory by overhanging the market. *See Bando Chem. Indus., Ltd. v. United States,* 17 CIT 798, 811–12 (1993) (upholding Commissioner's reliance on price depressing or suppressing effects of foreign inventories), *aff'd without op.,* 26 F.3d 139 (Fed. Cir. 1994). Accordingly, the court finds Chairman Watson's reliance on increased inventories as

support for his threat determination proper. In sum, the court finds that the threat of material injury determination of Chairman Watson and the present material injury determination of Commissioners Rohr and Newquist are supported by substantial evidence and are otherwise in accordance with law.

(Slip Op. 96–64)

PENTAX CORP., ET AL., PLAINTIFFS *v.*
LEWELLYN ROBISON, ET AL., DEFENDANTS

Consolidated Court No. 96–01–00067

[Plaintiffs' motion to enjoin advancement of duties denied.]

(Dated April 15, 1996)

Charles H. Bayar, Esq. for plaintiffs.
Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Elizabeth W. Newsom), Kathleen Bucholtz* and *Dyann Medina,* Regional Counsel, United States Customs Service, of counsel, for defendants.

OPINION

RESTANI, *Judge:* Pentax Corporation ("Pentax"), its parent company Asahi Optical Co., Ltd. ("AOC"), and AOC's wholly-owned subsidiary, Asahi Optical (International) Ltd. ("AOI") (collectively "Plaintiffs") filed actions seeking judicial review of a determination by the United States Customs Service ("Customs") that plaintiffs must pay $5,157,601.30 in alleged "actual loss of marking duties," plus accrued interest, to qualify for "prior disclosure" treatment under 19 U.S.C. § 1592(c)(4) (1988 & Supp. V 1993). Before the court is plaintiffs' motion for a preliminary injunction pursuant to USCIT Rule 65(a), requesting that the court enjoin defendants from requiring advancement of the duties pending judicial review of Customs' determination.[1] Defendants oppose plaintiffs' motion and move to dismiss plaintiffs' action for lack of subject matter jurisdiction.[2] A suit by the United States, arising out of the same transaction, to collect penalties has been consolidated with plaintiffs' action.

BACKGROUND

Pentax is an importer and distributor of photographic and optical equipment and accessories. Pentax imports these products from AOC, located in Japan, and AOI, located in Hong Kong. Since 1972, Pentax has imported AOI products produced in Hong Kong with such country of

---

[1] By consent, the United States and its officers and employees were so enjoined until the pending motion is decided.

[2] Defendants counterclaim to enforce civil penalties and to recover unpaid duties pursuant to 19 U.S.C. § 1592. Plaintiffs move to dismiss the counterclaims on the ground that the court lacks subject matter jurisdiction. The counterclaims track the claims in the collection action consolidated herein.

origin markings. In 1987, however, AOI gradually began shifting production from Hong Kong to the People's Republic of China, yet AOI "continued to mark these products and describe them on invoices issued to Pentax as being of Hong Kong origin." Pls.' Consol. Exs. in Supp. of Joint Application for T.R.O. [hereinafter Pls.' Consol. Exs.] at 2. Thus, subsequent Pentax imports of AOI products included goods produced in China, but neither the markings on the products, nor the invoices submitted with each shipment, nor the declaration made to Customs reflected this change of country of origin. Between July 7, 1987 and March 15, 1991, Pentax made approximately 300 entries of Chinese-made AOI products with Hong Kong origin markings, in violation of 19 U.S.C. § 1592(a) (1988 & Supp. V 1993).[3] The domestic value of this merchandise totaled nearly $60 million. On October 29, 1990, Customs' Regulatory Audit Division notified Pentax of its intention to conduct a formal audit of Pentax and its related foreign companies.

In order to qualify for reduced penalties for any violation that may ultimately be assessed against Pentax, by letters dated March 11, 1991, and April 10, 1991, Pentax made a "prior disclosure" to Customs, pursuant to 19 U.S.C. § 1592(c)(4), regarding its misstatements of the country of origin. That section provides formulas for calculating penalties at an amount much less than normal penalties if disclosure of the circumstances of a violation is voluntarily made "before, or without knowledge of, the commencement of a formal investigation of such violation." In addition, the person making prior disclosure is required to either "tender [ ] the unpaid amount of the lawful duties [of which the United States is or may be deprived,] at the time of disclosure, or within 30 days * * * after notice by the Customs Service of its calculation of such unpaid amount."[4] *Id.* Pentax did not tender or offer to tender any monies at the time of disclosure.

By letter dated May 22, 1991 [hereinafter "Myhra Determination"], Customs informed Pentax of the "actual loss of marking duties" resulting from Pentax's violations, which Customs calculated at $5,157,601.30 according to 19 C.F.R. § 134.2 (1991).[5] The Myhra Deter-

---

[3] Section 1592(a)(1) provides that:

> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence—
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
> (ii) any omission which is material, or
> (B) may aid or abet any other person to violate subparagraph (A).

[4] Customs' regulatory implementation of section 1592(c)(4) provides, *inter alia*, that:

> A person who discloses the circumstances of the violation shall tender any actual loss of duties at the time of disclosure or within 30 days after the district director notifies the person in writing of his calculation of the actual loss of duties. The district director may extend the period if he determines there is good cause to do so.

19 C.F.R. § 162.74(h) (1991).

[5] Section 134.2 provides, in relevant part, that:

> Articles not marked as required * * * shall be subject to additional duties of 10 percent of the final appraised value unless exported or destroyed under Customs supervision prior to liquidation of the entries provided in 19 U.S.C. § 1304(f). The 10 percent additional duty is assessable for failure either to mark the article (or container) to indicate the English name of the country of origin of the article or to include words or symbols required to prevent deception or mistake. 19 C.F.R. § 134.2. This regulatory provision implements 19 U.S.C. § 1304(f) (1988), which provides for additional duties for failure to properly mark products. *See infra* p. 14.

mination further required that, pursuant to 19 C.F.R. § 162.74(h), Pentax tender this amount within thirty days in order to be considered for prior disclosure treatment. Pentax appealed the Myhra Determination to Customs Headquarters on June 20, 1991, arguing that the "actual loss of marking duties" is not *"duties deprived as a result of"* its erroneous country of origin markings under the relevant statutory and regulatory provisions. Pls.' Consol. Exs. at 11. By letter dated November 20, 1991, Customs rejected Pentax's assertions, stating that

> [m]arking duties are considered by Customs as duties lost as a result of a violation. They accordingly are to be considered as an actual loss of duties required to be paid to complete the requirements of [19 U.S.C. § 1592(c)(4)] and [19 C.F.R. § 162.71(e)]. Therefore, [Pentax] must pay the actual loss of marking duties cited in [the Myhra Determination] before [it] can be entitled to the requested prior disclosure consideration.

Pls.' Consol. Exs. at 17. Customs did, however, grant an extension for tendering duties until December 20, 1991.

In response to Pentax's threat of suit, Customs again postponed the deadline for tendering duties. Ultimately, by letter dated April 20, 1992, Customs reaffirmed its earlier position that Pentax was required to remit the $5.2 million in "actual loss of duties" in order to qualify for prior disclosure treatment. *Id.* at 26. Customs set a new deadline for the remittance of the monies for May 5, 1992, and further stated that

> [f]ailure to pay by that deadline will preclude Customs from considering Pentax['s] submission under the prior disclosure provisions of 19 U.S.C. § 1592.

Id. Pentax did not tender the requested duties.

Instead, Pentax filed an action in the United States District Court for the District of Montana, seeking judicial review of Customs' determination under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706 (1988), and a preliminary injunction pending such review. The district court granted Customs' motion to dismiss, finding that "19 U.S.C. § 1592 afford[ed] Pentax a reasonable opportunity to challenge [Customs'] determination" and that "no basis exist[ed] for an interlocutory judicial review under the APA." *Pentax Corp. v. Myhra*, 844 F. Supp. 611, 615 (D. Mont. 1994), *aff'd*, 72 F.3d 708 (9th Cir. 1995). The district court granted Pentax's motion for a preliminary injunction pending review on appeal, on the condition that Pentax deposit $5.2 million in the court registry until the "actual loss of duties" issue was resolved. Pentax deposited this amount and filed a subsequent appeal to the Ninth Circuit Court of Appeals.

On January 12, 1995, Customs issued pre-penalty notices[6] to Pentax individually, and to AOC and AOI jointly and severally, setting forth, *inter alia*, the amount of actual loss of duties required for prior disclo-

[6] Section 1592(b)(1) of Title 19, United States Code, grants Customs authority to issue notice of "its intention to issue a claim for a monetary penalty" if it "has reasonable cause to believe that there has been a violation of [§ 1592(a)] and determines that further proceedings are warranted." 19 U.S.C. § 1592(b)(1) (1988 & Supp. V 1993).

sure treatment, as originally assessed in the Myhra Determination, and the proposed penalty allocated based on that amount. By letter of February 13, 1995, plaintiffs informed Customs that they would "not make any written or oral presentation in response to the * * * prepenalty notices." Pls.' Consol. Exs. at 92.

On July 31, 1995, the Ninth Circuit held that the district court lacked subject matter jurisdiction and stated that Pentax's action arises under 19 U.S.C. § 1304(f) which imposes additional duties for Pentax's failure to correctly mark the country of origin; therefore, "if judicial review is available at all, [it] is available only in the Court of International Trade." *Pentax Corp. v. Myhra,* 72 F.3d 708, 710–11 (9th Cir. 1995). Consequently, on January 12, 1996, plaintiffs' case was transferred to this court, along with the $5.2 million originally deposited in the registry of the district court.

Customs issued penalty notices on August 4, 1995, pursuant to 19 U.S.C. § 1592(b)(2), to Pentax individually for gross negligence, and AOC/AOI jointly and severally for fraud, reinstating the Myhra Determination that the disclosed violation entailed an "actual loss of duties" of $5,157,601.30, and demanding the payment pursuant to 19 U.S.C. § 1592(d) (Supp. V 1993). The assessed penalty for Pentax was $2,747,477.48 or, alternatively, $21,312,509.20, and for AOC/AOI $5,157,601.30 or, alternatively, $59,925,849.41. The lower amount is applicable only if there is a finding of prior disclosure by Customs, and the funds on deposit, including accrued interest, are submitted to Customs within ten (10) calendar days after the funds are released by order of the court. Plaintiffs again declined to submit a response to the penalty notices.

On February 13, 1996, the United States initiated an enforcement action in this court under 28 U.S.C. § 1582 (1994). Defendants filed an answer and counterclaims to plaintiffs' action, asserting entitlement to duties and penalties under § 1592, and alleging gross negligence or negligence against Pentax individually, and fraud, gross negligence, or negligence against AOC and AOI jointly and severally.

DISCUSSION

I. *Jurisdiction:*

Although defendants dispute the court's jurisdiction over importer-initiated actions under 19 U.S.C. § 1592, they contend that the court has jurisdiction to determine all issues relating to "prior disclosure" under 19 U.S.C. § 1592(c)(4) in an enforcement action, such as the one consolidated herein. Thus, the issue of whether pre-enforcement review is available has been mooted, and the court need not decide whether cases such as *Playhouse Import & Export, Inc. v. United States,* 843 F. Supp. 716 (Ct. Int'l Trade 1994) (denying pre-enforcement review), and *Dennison Mfg. Co. v. United States,* 12 CIT 1, 678 F. Supp. 894 (1988) (same), are distinguishable from the present action.

The parties are not in total agreement as to the scope of the court's jurisdiction, even in an enforcement action. *Trayco, Inc. v. United*

States, 994 F.2d 832, 837–38 (Fed. Cir. 1993), recognized a Tucker Act remedy *(see* 28 U.S.C. § 1346(a)(2) (1994)) for recovery of *penalties* paid in mitigation proceedings under 19 U.S.C. § 1592. It did not determine whether there was a remedy with respect to *duties* tendered to obtain prior disclosure treatment or in which court suits for such a remedy may be commenced.

Shiepe v. United States, 866 F. Supp. 1430, 1432–33 (Ct. Int'l Trade 1994), and *Miami Free Zone Corp. v. United States,* 17 CIT 687, 692, 826 F. Supp. 526, 530 (1993), both seem to conclude that *Trayco* limits importer-initiated penalty refund suits to the district courts or the Court of Federal Claims under the Tucker Act. *Shiepe,* in addition, makes clear that the *Carlingswitch v. United States,* 500 F. Supp. 223, 227 (Cust. Ct. 1980) (holding that neither importer's voluntary tender of mitigated penalty, nor Customs subsequent refusal to refund monies tendered, was an "exaction" under 19 U.S.C. § 1514 for purposes of establishing jurisdiction), *aff'd,* 651 F.2d 768 (C.C.P.A. 1981), line of cases must be viewed more narrowly than it might have been pre-*Trayco. See Shiepe,* 866 F. Supp. at 1433. Thus, amounts paid in mitigation proceedings may be recoverable and cannot always be considered voluntary. Further, it is by no means clear that, while pre-*Trayco* a penalty refund suit might have been viewed as a "new cause of action" for which jurisdiction would not lie under 28 U.S.C. § 1581,[7][8] the same conclusion should be reached after *Trayco. But cf. Miami Free Zone Corp.,* 17 CIT at 691–93 826 F. Supp. 529–30 (reaching same result as *ITT Semiconductor (see supra* note 7)). At least, suits challenging the legality of the penalty, rather than the merits of the mitigation decision, must not be "new" causes of action, but must be cognizable in some court, because *Trayco* recognized them as Tucker Act causes of action. *See Trayco,* 994 F.2d at 838; *see also Miami Free Zone Corp.,* 17 CIT at 692, 826 F. Supp. at 530.

This court, having jurisdiction of the enforcement action, likely would have compulsory counterclaim jurisdiction over a penalty refund claim which, if brought only by plaintiffs originally, might have been heard elsewhere. Whether an importer-initiated suit for return of § 1592 duties, as opposed to penalties, follows the same route is not clear. Certainly the Ninth Circuit would seem to recognize this court's exclusive jurisdiction with regard to any such action which did exist. *See Pentax Corp. v. Myhra,* 72 F.3d at 710–11. Imposition of the duties involves both

---

[7] *See ITT Semiconductors v. United States,* 6 CIT 231, 236–38, 576 F. Supp. 641, 645–46 (1983) (no 28 U.S.C. § 1581(a) jurisdiction because mitigation amount not a charge or exaction under 19 U.S.C. § 1514; no 28 U.S.C. § 1581(i) jurisdiction because no new cause of action created thereunder).

[8] In addition to the exclusive jurisdiction conferred upon the court under 28 U.S.C. § 1581(a)–(h), Congress has granted the court, under 28 U.S.C. § 1581(i) (1994):

> [E]xclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

19 U.S.C. § 1304(f) and 19 U.S.C. § 1592(a) & (d), which would seem to implicate the court's jurisdiction to resolve issues of enforcement and administration with respect to duties. *See* 28 U.S.C. § 1581(i)(1), (2) & (4). Both parties, however, while conceding this court's jurisdiction to declare the law as to prior disclosure treatment under the current case posture, seem in great doubt as to whether any court actually could order refund of duties tendered to acquire prior disclosure treatment.

The court does not consider the matter insurmountable. The court has jurisdiction to declare the law as to the requirements of prior disclosure. If a duty refund claim exists at law, at least, it may be pleaded as a counterclaim. If, ultimately, the court is wrong and funds are tendered which need not have been advanced, there may be a right to refund. If not, it is the effect of the statutory scheme. In any case, plaintiffs will obtain judicial review before they are forced to choose between, on one hand, tendering duties, the remedies for wrongful collection of which are somewhat cloudy, and, on the other hand, risking imposition of penalties as high as $70 million. The parties have not asserted in these circumstances that such a choice implicates *Ex Parte: Young*, 209 U.S. 123, 148 (1908) (parties cannot be forced to submit themselves to extraordinary penalties in order to obtain judicial review). Accordingly, jurisdiction attaches.

Because no factual issues need be resolved and the legal issues have been fully briefed, the court will decide the issue raised by plaintiffs' motion finally as opposed to preliminarily. Thus, only the merits of plaintiffs' prior disclosure argument remain at issue.

II. *Prior Disclosure:*

Country of origin markings are required of imported goods. 19 U.S.C. § 1304(a) (1988); 19 C.F.R. § 134.11 (1991). An importer which has mismarked the country of origin of imported merchandise is subject to additional duties of ten percent of the value of the merchandise imported. 19 U.S.C. § 1304(f); 19 C.F.R. § 134.2. Here, Pentax, AOC and AOI imported or caused to be imported into the United States photographic and optical merchandise produced in China that were marked "Hong Kong" as their country of origin. Thus, such acts violated the marking requirement and entailed a statutory ten percent additional duty.

Additionally, the statute expressly prohibits any person, by fraud, gross negligence, or negligence, from entering any merchandise into the United States by means of material and false documentation or statements, nor may any person aid and abet another to commit such a violation. 19 U.S.C. § 1592(a)(1). Further, 19 C.F.R. § 141.81 (1991) requires that "[a] special summary invoice, or a commercial invoice, * * * be presented for each shipment of merchandise at the time the entry summary is filed." Pentax declared the goods to Customs to be of Hong Kong origin. Such misstatement also appeared on the invoices accompanying the merchandise. Plaintiffs do not dispute that a violation of 19 U.S.C.

§ 1592(a) has occurred.[9] A violation may exist "[w]ithout regard to whether the United States is or may be deprived of all or a portion of any lawful duty." 19 U.S.C. § 1592(a). "[I]f the United States has been deprived of *lawful duties,* * * * as a result of a violation of [§ 1592(a)]," section 1592(d) provides that Customs "shall require that such *lawful duties,* * * * be restored, *whether or not a monetary penalty is assessed.*" *Id.* § 1592(d) (emphasis added). Plainly, the lawful duties are due and payable regardless whether other penalties are also assessed. Plaintiffs, however, refuse to pay the duties, arguing that as China and Hong Kong are both "Column 1" countries, the violation did not affect the assessment of duties; therefore, the government has not been deprived any lawful duties. This argument is meritless.

Plaintiffs do not attach enough importance to 19 U.S.C. § 1304(f) which is entitled "Additional duties for failure to mark" and provides, in part:

> If at the time of importation any article (or its container, * * *) is not marked in accordance with the requirements of this section, * * * there shall be levied, collected, and paid upon such article a duty of 10 per centum ad valorem, which shall be deemed to have accrued at the time of importation, *shall not be construed to be penal, and shall not be remitted wholly or in part nor shall payment thereof be avoidable for any cause.* Such duty shall be levied, collected, and paid *in addition to any other duty* imposed by law and whether or not the article is exempt from the payment of ordinary customs duties.

Id. (emphasis added). Clearly, as a consequence of the failure to correctly mark the country of origin on the imported merchandise, additional duties at ten percent of the value of such merchandise are owed. The court is not persuaded by plaintiffs' argument that "[o]n its face, the non-avoidance language [of § 1304(f)] applies only to the payment of marking duties that have been 'levied' on liquidation." Pls.' Reply Mem. at 48. Just the opposite, § 1304(f) states that the point of time when marking duties are deemed accrued is the time of importation. Liquidation is not at issue in § 1304(f). The effects of liquidation are dealt with elsewhere, such as in 19 U.S.C. § 1592(d). In *United States v. Ross,* 6 CIT 270, 574 F. Supp. 1067 (1983), the court noted that:

> [Section 1592(d)] was added by the Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95–410, § 110(a), 92 Stat. 888, 896, in order to remedy the problems relating to the finality of liquidations. The United States, pursuant to § 1592(d), may seek the restoration of duties even though *a particular entry and liquidation have become final* within the meaning of 19 U.S.C. § 1514(a) (1982).

Id. at 271 n.1, 574 F. Supp. at 1068 n.1 (emphasis added).

---

[9] Duties are owed under 19 U.S.C. § 1592(d) whether or not the violation was committed by a party other than those involved in this action. *United States v. Blum,* 858 F.2d 1566, 1569 (Fed. Cir. 1988) (interpreting "the authority of the United States to seek lost import duties under [§ 1592(d)] as not limited to those parties that have violated [§ 1592(a)] but as extending to those parties who may have been deemed responsible for the lawful duties had such duties lawfully been imposed"). Nowhere in their papers have plaintiffs asserted that some level of 19 U.S.C. § 1592(a) violation did not occur.

Most importantly, the express language of § 1304(f) construing the additional duties so assessed as non-penal brings it within the meaning of "lawful duty" under § 1592(a)(1) and § 1592(d). This lawful duty is separate and distinct from, and should not be confused with, the additional penalty that may be assessed under § 1592(c).

Plaintiffs further assert that "deprivation of duties" under § 1592(c)(4) must be caused by the § 1592 violation. First, this assertion lends support to the interpretation of "lawful duty" upon which § 1592(c)(4) penalty calculation is based. Second, it is the continuation of the § 1592(a) violation which deprived the government of duties. Had the faulty markings been revealed before liquidation marking duties would have been collected under 19 U.S.C. § 1304(f).

Plaintiffs' further "real world" arguments are unpersuasive: First, plaintiffs argue that in the "real world," instead of assessing a ten percent marking duty on liquidated merchandise for plaintiffs' failure to correctly mark the imported merchandise, plaintiffs maintain that according to 19 C.F.R. § 134.51(a),[10] Customs "would have notified the importer, Pentax, to remark, export or destroy the goods." Pls' Reply Mem. at 40. Second, plaintiffs argue that "Customs would have detained in Customs['] custody any mismarked shipments * * * [pursuant to] 19 C.F.R. § 134.3(a).[11] * * * Pentax would have remarked these detained goods * * * and so would not have incurred marking duties on those ensuing entries." *Id.* Third, at oral argument plaintiffs asserted that if duties had been assessed on liquidation of the first entry, they would have noticed the mismarking problem and almost all of the entries would have been marked properly. The court fails to see the merit of plaintiffs' arguments.

First, merchandise need not remain in the importers' or Customs' control between entry and liquidation. Goods are released immediately under bond. Plaintiffs do not assert that they can establish, at this time, that unusual fact patterns would have existed as to any particular entry which would have kept the goods in Customs, or even their own, control. Second, it is undisputed that plaintiffs informed Customs of the violations after all of the subject merchandise was liquidated. It is also undisputed that the assessment of the additional duties was based solely on merchandise already liquidated. Thus, plaintiffs can only speculate about other scenarios. Whatever remedy might have existed under either 19 C.F.R. § 134.51(a) or 19 C.F.R. § 134.3(a), or was in plaintiffs' own control, to cure plaintiffs' mistakes is not shown to have been available in the instant case.

---

[10] Section 134.51(a) provides that:

When articles or containers are found upon examination not to be legally marked, the district director shall notify the importer * * * to arrange with the district director's office to properly mark the article or containers, or to return all released articles to Customs custody for marking, exportation, or destruction.

19 C.F.R. § 134.51(a) (1991).

[11] Section 134.3(a) provides:

Any imported article (or its container) held in Customs custody for inspection, examination, or appraisement shall not be delivered until marked with its country of origin, or until estimated duties payable under 19 U.S.C. 1304(f), or adequate security for those duties (see § 134.53(a)(2)), are deposited.

19 C.F.R. § 134.3(a) (1991).

Plaintiffs' assertion that defendants have been deprived of no lawful duty flies in the face of both the statutory language of 19 U.S.C. § 1304(f) and 19 U.S.C. § 1592(d) and common sense. Plaintiffs' position would defeat the statutory purpose of promoting correct markings of imported goods. They would have the court hold that an importer has a free hand in declaring and marking the country of origin to its benefit and convenience as long as it can disguise the problem until after liquidation.

Consumers choose merchandise for particular reasons. Country of origin may very well be the deciding factor. By mismarking the merchandise, plaintiffs deprived consumers of their choice to buy or avoid goods from certain countries. If a person prefers to purchase a camera made in China, he or she is not given the choice to purchase plaintiffs' products even if they are among the goods to be chosen from. Conversely, if a person does not desire to purchase a Chinese-made camera, he or she may be misled into buying plaintiffs' products, thereby defeating his purpose.

Marking duties may be viewed as analogous to "liquidated damages" in that they may compensate for whatever difficult-to-compute damage is caused by permitting mismarked goods to enter the commerce of the United States. By concealing the mismarking until after the time the merchandise entered into such commerce, the § 1592 violation deprived the United States of marking duties, which would have been collected upon discovery. While the § 1592(a) violation caused the duties to accrue, its continuation both before and after liquidation also caused the deprivation of the duties. In order to be entitled to prior disclosure treatment under 19 U.S.C. § 1592(c)(4), plaintiffs must tender the lawful marking duties owed.

CONCLUSION

To receive prior disclosure treatment, within ten days hereof plaintiffs must authorize the release of the funds in the court's control to Customs. The preliminary injunction will expire at such time.

NOTE: This is to advise that Slip Op. 96–65 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 96–65)

YUE PAK CO., LTD. AND HE-RO CHEMICALS, LTD., PLAINTIFFS *v.* U.S. INTERNATIONAL TRADE ADMINISTRATION, DEFENDANT *v.* CARUS CHEMICAL CO., DEFENDANT-INTERVENOR

Court No. 94–06–00364

(Dated April 18, 1996)

(Slip Op. 96–66)

XEROX CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–05–00286

[Plaintiff's motion to vacate order of dismissal and to suspend denied.]

(Dated April 19, 1996)

Neville, Peterson & Williams (John M. Peterson) for plaintiff.
Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Civil Division, United States Department of Justice *(Barbara M. Epstein)* for defendant.

MEMORANDUM AND ORDER

GOLDBERG, *Judge:* This matter comes before the Court on plaintiff's motion to vacate an order dismissing this case, and to suspend the case under *Xerox Corp. v. United States,* Court No. 91–08–00599 ("a test case"). Defendant does not object to plaintiff's motion, but defers to the Court's discretion as to whether to grant the motion.

BACKGROUND

This case was placed on the Court's reserve calendar when plaintiff filed a summons on May 18, 1994. More than 20 months later, on January 24, 1996, the Clerk dismissed this case pursuant to USCIT Rule 83(c). This rule provides, in part:

> An action not removed from the Reserve Calendar within the 18-month period shall be dismissed for lack of prosecution and the clerk shall enter an order of dismissal without further direction from the court unless a motion is pending.

DISCUSSION

Plaintiff asks the Court to vacate the January 24, 1996 order of dismissal pursuant to USCIT Rule 60. This rule provides, in part, that the Court may relieve a party from a final judgment or order based upon the party's mistake, inadvertence, or excusable neglect.

The Court has indicated that when a party seeks relief from an order of dismissal for lack of prosecution, the party should present any facts in mitigation of its neglect of the case. *Telectronics Pacing Systems, Inc. v. United States,* slip op. 96–59 at 3 (March 29, 1996). In addition, the Court has admonished parties that motions seeking formal relief:

> must be presented in such a way as to convince the court that grant is appropriate. * * * The absence of any alleged supportive facts is all the more critical in view of the precise nature of the relief the plaintiff seeks. Indeed, a party plaintiff has a primary and independent obligation to prosecute any action brought by it—from the moment of commencement to the moment of final resolution. That primary responsibility never shifts to anyone else, and entails the timely taking of all steps necessary for its fulfillment.

Avanti Products, Inc. v. United States, 16 CIT 453, 453 (1992) (citations omitted).

In its motion, plaintiff ignores the admonition of the Court. Plaintiff asserts that the Court should vacate the order of dismissal in this case because plaintiff "inadvertently omitted" this case from a list of cases that were suspended under a test case on January 23, 1996. Plaintiff fails, however, to give the Court any additional information concerning its inadvertence, or to present any facts in mitigation of its long term neglect of this case. Because plaintiff has failed to convince the Court that dismissal of this case is unwarranted, it is hereby

ORDERED that plaintiff's motion to vacate order of dismissal and to suspend is hereby DENIED.

(Slip Op. 96–67)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MFG. CORP., AND NTN CORP., PLAINTIFFS *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE AND RONALD H. BROWN, SECRETARY, U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TIMKEN CO., DEFENDANT-INTERVENOR

Consolidated Court No. 93–12–00793

Plaintiffs, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation (collectively "NTN"), move pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record challenging aspects of the final determination of the Department of Commerce, International Trade Administration ("Commerce" or "ITA"), entitled *Final Results of Antidumping Duty Administrative Reviews; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan ("Final Results")*, 58 Fed. Reg. 64,720 (1993). Specifically, plaintiffs allege that Commerce erred in (1) refusing to apply a ten percent cap as part of the sum of the deviations model match methodology; (2) splitting the price of sets sold in the home market for the purpose of determining foreign market value ("FMV") of cups and cones sold individually in the United States; (3) performing the cost of production test after splitting the sets into cups and cones; (4) using individual cups and cones sold as components of sets as comparison models; (5) using best information available to determine variable cost of manufacturing; (6) including zero price sales, sample sales and small quantity sales as home market sales; (7) comparing merchandise sold at different levels of trade; (8) denying a level of trade adjustment; (9) using a three month extended period of time test; (10) using certain sales in determining FMV; and (11) comparing bearings of different design types.

Held: Plaintiffs' motion for judgment on the agency record is denied and this case is dismissed.

[Plaintiffs' motion denied and case dismissed.]

(Dated April 19, 1996)

Barnes, Richardson & Colburn (Donald J. Unger and *Jesse M. Gerson)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Michael S. Kane);* of counsel: *Linda Chang,* Attorney-Advisor, U.S. Department of Commerce, for defendants.

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr., William A. Fennell and *Olufemi A. Areola)* for defendant-intervenor.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation (collectively "NTN"), commenced this action challenging certain aspects of the Department of Commerce, International Trade Administration's ("Commerce" or "ITA") final results of administrative review entitled *Final Results of Antidumping Duty Administrative Reviews; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan ("Final Results"),* 58 Fed. Reg. 64,720 (1993).

BACKGROUND

On November 22, 1991, Commerce initiated administrative reviews of tapered roller bearings ("TRBs") from Japan covering the period of 1990 to 1991. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 56 Fed. Reg. 58,878 (1991). On November 27, 1992, Commerce initiated administrative reviews of TRBs imported from Japan during the period of 1991 to 1992. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 57 Fed. Reg. 56,318 (1992). Commerce published the preliminary results of both reviews on September 30, 1993. *See Preliminary Results of Antidumping Duty Administrative Reviews; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan,* 58 Fed. Reg. 51,058 (1993).

On December 9, 1993, Commerce published its final determinations concerning these reviews. *See Final Results,* 58 Fed. Reg. at 64,720. NTN commenced this action pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record alleging the following actions by Commerce were unsupported by substantial evidence on the agency record and not in accordance with law: (1) refusing to apply a ten percent cap as part of the sum of the deviations model match methodology; (2) splitting the price of sets sold in the home market for the purpose of determining foreign market value ("FMV") of cups and cones sold individually in the United States; (3) performing the cost of production test after splitting the sets into cups and cones; (4) using individual cups and cones sold as components of sets as comparison models; (5) using best information available ("BIA") to determine variable cost of manufacturing; (6) including zero price sales, sample sales and small quantity sales as home market sales; (7) comparing merchandise sold at different levels of trade; (8) denying a level of trade adjustment; (9) using a three month extended period of time test; (10) using certain sales in determining FMV; and (11) comparing bearings of different design types. Pls.' Mem. Supp. Mot. J. Agency R. at 15–77.

On February 3, 1994, this Court granted plaintiffs' consent motion for a preliminary injunction enjoining Commerce from liquidating entries

of TRBs subject to the Final Results at issue during the pendency of this litigation.

DISCUSSION

The Court's jurisdiction in this action is derived from 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with the law." 19 U.S.C. § 1516a(b)(1)(B) (1994). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on the grounds of a differing interpretation of the record." *Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed. Cir. 1990).

1. *Model Match Methodology:*

NTN argues that Commerce erred in refusing to impose a ten percent limit upon individual bearing deviations as part of its five-criteria model match methodology for selecting the most similar home market TRB model. According to NTN, Commerce is required to employ a ten percent deviation cap as part of its sum of the deviations methodology. Pls.' Mem. Supp. Mot. J. Agency R. at 15–21.

Commerce responds that when identical merchandise is not available in the home market for comparison with the merchandise sold to the United States, Commerce must select the "most similar" merchandise based upon the physical characteristics of the merchandise being compared. Defs.' Opp'n to Pls.' Mot. J. Agency R. at 14; 19 U.S.C. § 1677(16) (1988).[1] In this review, Commerce compared home market sales of TRBs to U.S. sales by devising a "sum of the deviations" methodology. Under this approach, Commerce uses five physical characteristics (inner diameter, outer diameter, width, Y factor, and load rating) as criteria for selecting "similar" model matches. Commerce explains that in conjunction with the "sum of the deviations" methodology, it applied a twenty percent cost cap that prevents the matching of United States and

---

[1] 19 U.S.C. § 1677(16) (1988) provides:

The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:

(A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—

(i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,

(ii) like that merchandise in component material or materials and in the purposes for which used, and

(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise—

(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,

(ii) like that merchandise in the purposes for which used, and

(iii) which the administering authority determines may reasonably be compared with that merchandise.

home market models whose variable cost of manufacturing differs by more than twenty percent. Commerce argues its actions are within its discretion and in accordance with law. Defs.' Opp'n to Pls.' Mot. J. Agency R. at 12–15.

The Court of Appeals for the Federal Circuit ("CAFC") recently ruled on this issue in *Koyo Seiko Co. v. United States*, 66 F.3d 1204 (Fed. Cir. 1995), holding that Commerce's model match methodology, without the ten percent cap, is a permissible approach under 19 U.S.C. § 1677(16). In reaching its conclusion, the CAFC noted that under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), where a statute is silent or ambiguous with respect to a specific issue, the court is limited to determining whether the agency's approach is a permissible construction of the statute. *Koyo*, 66 F.3d at 1209. The CAFC upheld Commerce's construction of the statute stating the following:

> Commerce's interpretation is reasonable because there is no evidence that any one of the five criteria should be decisive in determining whether to match a given U.S. TRB with a home-market TRB. By choosing not to apply the ten percent cap, Commerce in essence weighs each of the five criteria equally, which is plainly reasonable.

Koyo, 66 F.3d at 1210.

In light of the decision of the CAFC in *Koyo*, the Court finds that Commerce's model match methodology without the ten percent cap is a reasonable approach and consistent with law.

2. *Splitting TRB Sets to Calculate FMV:*

For these Final Results, Commerce decided to split sales of TRB sets in the home market into sales of individual cups and cones for the purpose of establishing FMV. 58 Fed. Reg. at 64,722. NTN argues that Commerce's practice of splitting sets creates fictitious sales and fictitious markets which is contrary to the statutory framework of antidumping law. Pls.' Mem. Supp. Mot. J. Agency R. at 22–32.

Commerce responds that the splitting of TRB sets did not create fictitious prices because Commerce used actual prices based upon actual sales in the home market. Commerce argues that "[b]y 'splitting' TRB sets into TRB components, Commerce obtained sufficiently large 'pools' of potentially comparable cups and cones in order to implement the congressional preference for using prices rather than constructed value in determining foreign market value." Defs.' Opp'n to Pls.' Mot. J. Agency R. at 15. According to Commerce, its methodology is reasonable and consistent with the statute. *Id.* at 15–24.

This Court has already upheld Commerce's practice of splitting sets to calculate FMV. *NTN Bearing Corp. of Am. v. United States ("NTN I")*, 18 CIT ____, ____, 881 F. Supp. 584, 590 (1994). Specifically, this Court found that "[r]ather than frustrating the purpose of the antidumping law, ITA's set-splitting methodology furthers that purpose by discouraging circumvention." *Id.* NTN has not presented any new arguments per-

suading the Court to reconsider its position. Accordingly, the Court sustains Commerce on this issue.

3. *Inclusion of Split Cups and Cones in the Cost of Production Test:*

In the review at issue, Commerce performed its cost of production test after splitting cups and cones. *Final Results,* 58 Fed. Reg. at 64,729. NTN contends that if splitting is a permissible practice, the cost of production test should occur before as opposed to after the splitting. Pls.' Mem. Supp. Mot. J. Agency R. at 39–44. According to NTN, the cost of production is based on sets and not on individual cups and cones. NTN also asserts that performing the cost of production test after splitting is inconsistent with 19 U.S.C. § 1677b(b) (1988) which authorizes Commerce to apply the cost of production test to "prices" rather than "values" derived from splitting. Pls.' Mem. Supp. Mot. J. Agency R. at 40.

In rebuttal, Commerce explains that it is able to determine accurately the cost of production of individual cups and cones based on the cost of production of sets because the data submitted by NTN establishes the portion of the cost of production of each set allocable to the individual cup and/or cone. Defs.' Opp'n to Pls.' Mot. J. Agency R. at 29–30. Commerce explained this methodology in the Final Results as follows:

> The COP [cost of production] figures we derive from set-splitting when we split prior to conducting the cost test are based on the variable cost of the cup to the cost of the set and the variable cost of the cone to the cost of the set. These ratios are based on costs NTN actually incurred in producing the individual cups and cones. Therefore, the resulting COP figures are not fictional.

58 Fed. Reg. at 64,729.

In *Timken Co. v. United States,* 18 CIT ____, ____, 862 F. Supp. 413, 421 (1994), *aff'd,* 74 F.3d 1260 (Fed. Cir. 1996), this Court ordered Commerce to perform the cost of production test after splitting sets of cups and cones. In accordance with the remand order, Commerce performed the cost of production test after splitting the TRB sets and the Court affirmed the results of the remand determination. *Timken Co. v. United States,* 19 CIT ____, Slip Op. 95–20 (Feb. 10, 1995). Accordingly, the Court upholds Commerce's practice of performing the cost of production test after splitting the sets as consistent with law.

4. *Splitting of All Sets:*

NTN contends that Commerce attempted to split certain TRB models that cannot be split. The models at issue are: TRB units, TRB double row models, TRB thrust bearings, TRB flanged bearings, and TRB high precision models. Pls.' Mem. Supp. Mot. J. Agency R. at 45. According to NTN, TRB models that NTN never sells individually in any market are "unsplittable." *Id.* at 44–46.

Commerce responds that NTN's argument is the same argument rejected by this Court in *NTN Bearing Corp. of Am. v. United States,* 14 CIT 623, 639–40, 747 F. Supp. 726, 740–41 (1990). Defs.' Opp'n to Pls.' Mot. J. Agency R. at 31. Commerce further contends that its methodol-

ogy is consistent with 19 U.S.C. § 1677(16) which does not require "such or similar" merchandise to be sold in the same manner as the merchandise under review. *Id.* at 31–32.

In support of Commerce's position, The Timken Company ("Timken"), defendant-intervenor, argues that "similarity" is determined based upon five physical characteristics, and that NTN's assertion that a cup or a cone sold that is always sold in a set can never be similar to a cup or cone sold individually creates an additional matching factor not warranted by the statute. Def.-Int.'s Mem. Opp'n to Pls.' Mot. J. Agency R. at 20–21.

In *NTN I*, 18 CIT at ____, 881 F. Supp. at 590, this Court noted that 19 U.S.C. § 1677b(a)(1)(B)[2] "is intended to prevent foreign manufacturers from using misleading invoices or other practices to circumvent the antidumping law." In upholding Commerce's set-splitting methodology, the Court acknowledged that splitting sets "not only discourages such circumvention, it does not permit it." *Id.* The Court further noted that "[i]n the absence of the agency's practice of splitting sets and determining prices based on relative production costs, NTN could have compelled the use of constructed value simply by selling sets in one market and single cups and cones in another." *Id.* The acceptance of NTN's argument would result in the potential circumvention of the law that set splitting is design to prevent because NTN would be able to manipulate Commerce's determinations by selling TRBs individually rather than in sets. Therefore, the Court affirms Commerce on this issue.

5. *Use of Best Information Available:*

In this review, Commerce resorted to BIA to determine variable cost of manufacture ("VCOM"). *Final Results,* 58 Fed. Reg. at 64,731. To derive a VCOM of the home market model, Commerce reduced the United States VCOM by 20 percent. *Id.*

NTN acknowledges that it did not report the VCOM for certain models, but argues that Commerce's resort to BIA was unwarranted. Pls.' Mem. Supp. Mot. J. Agency R. at 46–47. NTN submits that Commerce's methodology "ensures potential matching of split cups and cones resulting from splits of 'unsplittable' TRB models." *Id.* at 47. According to NTN, Commerce's methodology produces matches without taking into account the physical characteristics of the merchandise involved. *Id.*

---

[2] Section 1677b(a)(1), United States Code (1988), defines FMV as follows:

> The foreign market value of imported merchandise shall be the price, at the time such merchandise is first sold within the United States by the person for whom (or for whose account) the merchandise is imported to any other person who is not described in subsection (e)(3) of this section with respect to such person—
>
> (A) at which such or similar merchandise is sold or, in the absence of such sales, offered for sale in the principal markets of the country from which exported, in the usual commercial quantities and in the ordinary course of trade for home consumption, or
>
> (B) if not sold or offered for sale for home consumption, or if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the Unites States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States,
>
> increased by, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States * * *. In the ascertainment of foreign market value for the purposes of this subtitle no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

Commerce responds that NTN's failure to provide information requested justified its resort to BIA regardless of whether NTN disagreed with Commerce's decision to split certain TRB sets. Defs.' Opp'n to Pls.' Mot. J. Agency R. at 32–33. Commerce also states that because NTN failed to supply information that would allow a more accurate determination, Commerce's derivation of a VCOM by reducing the United States VCOM by 20 percent is proper. *Id.* at 33–34. Commerce also emphasizes that it has used this approach in past reviews. *Id.* at 33.

Section 1677e(c) of Title 19, United States Code (1988), states that Commerce "shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available." In addition, Commerce's regulations instruct the Secretary to use BIA whenever Commerce:

> (1) Does not receive a complete, accurate, and timely response to the Secretary's request for factual information; or
>
> (2) Is unable to verify, within the time specified, the accuracy and completeness of the factual information submitted.

19 C.F.R. § 353.37(a) (1993).

NTN does not dispute that it did not provide Commerce with the VCOM for certain TRBs. NTN cannot justify its failure to supply requested information by arguing that the sets are unsplittable. NTN's assertion is contrary to the principle that "[i]t is Commerce, not the respondent, that determines what information is to be provided for an administrative review." *Ansaldo Componenti, S.p.A. v. United States,* 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986). Further, the Court has already determined that Commerce's decision to split all models was supported by law. *See supra* at 10–12. As such, NTN's decision to withhold information from Commerce justified Commerce's resort to BIA.

As for Commerce's choice of BIA, the CAFC has held that because Congress explicitly left a gap for the agency to fill, it is within Commerce's discretion to decide what constitutes best information available in a particular case. *Allied-Signal Aerospace Co. v. United States,* 996 F.2d 1185, 1191–92 (Fed. Cir. 1993). Therefore, this Court must grant Commerce considerable deference in this area.

Granting Commerce the appropriate deference, the Court finds Commerce's choice of BIA to be reasonable and within its discretion. The Court upheld Commerce's approach in an earlier case in the face of a challenge by domestic industry that Commerce should have applied more adverse BIA. *Timken Co. v. United States,* 18 CIT ___, ___, 865 F. Supp. 854 (1994). In light of this prior decision, the Court finds that Commerce's choice of BIA is supported by substantial evidence and in accordance with law.

6. *Inclusion of Zero Price Sales, Sample Sales and Small Quantity Sales as Home Market Sales:*

NTN objects to Commerce's inclusion of zero price sales, sample sales and small quantity sales as home market sales. NTN submits that these

sales should have been excluded because NTN reported them as being outside the ordinary course of trade. Pls.' Mem. Supp. Mot. J. Agency R. at 47–51. In support of its argument, NTN contends that sample sales cannot be considered sales in the ordinary course of trade pursuant to 19 U.S.C. § 1677b(a)(1),[3] because the merchandise sold as sample sales is not used by customers. *Id.* at 48. NTN also emphasizes that small quantity sales cannot be deemed ordinary due to the extremely small quantities involved. *Id.* Finally, NTN insists that Commerce's actions in the present review are inconsistent with its treatment of these sales in prior reviews. *Id.* at 48–51.

In the Final Results, Commerce explained its reasons for including the sales in question as home market sales:

> Based upon our review of the record for these reviews and our recent [verification] of NTN * * * we are not satisfied that NTN * * * [has] provided evidence to substantiate that NTN's sample and small quantity sales * * * are indeed outside the ordinary course of trade. The fact that respondents identify a sale as a sample or prototype or maintain an internal record of the sale as a sample does not alone support the sales classification as outside the ordinary course of trade for the purposes of antidumping calculations.
>
> Likewise, infrequent sales of small quantities of certain models or sales of models at a high price to only a few customers is also insufficient to establish a sale as outside the ordinary course of trade.

58 Fed. Reg. at 64,732.

This Court has upheld Commerce's decision to include NTN's zero price sales, sample sales and small quantity sales in its calculation of FMV in a previous case. *NTN Bearing Corp. of Am. v. United States ("NTN II")*, 19 CIT ___, ___, 905 F. Supp. 1083, 1090–91 (1995). In *NTN II*, the Court found that "NTN's sales information merely identifi[ed] certain sales as home market sample sales and other sales (including sample sales, sales with zero price, and sales that were infrequent) as not in the ordinary course of trade." *Id.* at ___, 905 F. Supp. at 1090–91. The Court further stated that "[w]ithout a complete explanation of the facts which establish the extraordinary circumstances rendering particular sales outside the ordinary course of trade, Commerce cannot exclude those sales from FMV." *Id.* at ___, 905 F. Supp. at 1091. The evidence provided by NTN in *NTN II* is the same as the evidence provided in the review at issue. Further, in *NTN II*, Commerce explained its decision to include the sales in its calculation of FMV in the same manner as in the present case. This Court adheres to its decision in *NTN II*, and sustains Commerce's decision as supported by substantial evidence and in accordance with law.

---

[3] 19 U.S.C. § 1677b(a)(1)(A) (1988) instructs Commerce to compare the price of merchandise imported into the United States to the price of merchandise sold or offered for sale "in the principal markets of the country from which exported, in the usual commercial quantities and in the ordinary course of trade for home consumption * * *."

7. *Comparison of Sales Across Different Levels of Trade:*

In this review, NTN reported sales made at three levels of trade: original equipment manufacturers, distributors and aftermarket. Commerce, however, compared U.S. and home market sales across different levels of trade if there was no match at the same level of trade. *Final Results,* 58 Fed. Reg. at 64,730. It is NTN's position that Commerce's methodology results in the comparison of merchandise that is not approximately equal in commercial value. Pls.' Mem. Supp. Mot. J. Agency R. at 52–57. According to NTN, Commerce's actions are contrary to the definition of "such or similar merchandise" contained in 19 U.S.C. § 1677(16)(B). *Id.*

In rebuttal, Commerce argues that "level of trade" is not one of the criteria for selecting "such or similar merchandise" pursuant to 19 U.S.C. § 1677(16). Defs.' Opp'n to Pls.' Mot. J. Agency R. at 40. Commerce further responds that it determined that the merchandise sold at different levels of trade were approximately equal in value by using its twenty percent cost test. Pursuant to this test, Commerce compared the VCOM for the home market model proposed for comparison with the VCOM of the U.S. model, and if the difference was greater than twenty percent, it rejected the home market as a comparison model. *Id.* at 41; *see also Final Results,* 58 Fed. Reg. at 64,721.

This Court sustained Commerce's comparison of sales across different levels of trade as being in accordance with law in *NTN II,* 19 CIT at ____, 905 F. Supp. at 1092–93. *See also NTN Bearing Corp. of Am. v. United States,* 19 CIT at ____, ____, 903 F. Supp. 62, 69 (1995); *NTN I,* 18 CIT at ____, 881 F. Supp. at 590–91; *NTN Bearing Corp of Am. v. United States,* 18 CIT ____, ____, 858 F. Supp. 215, 220–21 (1994). As NTN has not raised any new arguments persuading the Court to depart from its earlier decisions, the Court sustains Commerce on this issue.

8. *Level of Trade Adjustment:*

In addition to crossing levels of trade, Commerce allowed a level of trade adjustment to FMV based only on the indirect selling expenses. *Final Results,* 58 Fed. Reg. at 64,731. Commerce supported its determination with the following explanation:

> Because NTN provided us with cost-based data demonstrating that it incurs different costs at difference levels of trade, we have granted NTN the adjustment. However, NTN's argument that a level of trade adjustment should be based on differences in price levels does not address the issue of whether the differences in price are due solely to the difference in level of trade, or whether there are other factors that affect price. Because we already make adjustments for NTN's direct selling expenses, we have based the level of trade adjustment on indirect selling expenses in order to avoid double counting the direct selling expenses.

Id.

NTN objects to Commerce's decision claiming that such an adjustment fails to account for price differences existing among levels of trade.

Pls.' Mem. Supp. Mot. J. Agency R. at 57–68. In support of its position, NTN states that Commerce did not provide an explanation for its decision to reject NTN's claimed level of trade adjustment. NTN insists that Commerce placed an unfair burden on NTN by requiring proof concerning the reason for price differences. According to NTN, neither the statute nor the relevant regulation permitting adjustments to FMV require a showing that price differences result solely from differences in levels of trade. *Id.* at 61–67 (citing 19 U.S.C. § 1677b(a)(4); 19 C.F.R. § 353.58 (1993)).

Commerce responds that it properly denied NTN an adjustment based upon the full price differences among levels of trade because NTN failed to meet its burden of submitting evidence of entitlement to such a deduction. Commerce insists that its regulations authorize adjustments for differences in circumstances of sale resulting in price differences and not for the price differences themselves. Defs.' Opp'n to Pls.' Mot. J. Agency R. at 44–45. Commerce further maintains that the burden of establishing a claimed adjustment falls on the claimant. *Id.* at 46–47.

When Commerce compares sales at differing levels of trade, it is authorized to make a circumstance of sale adjustment pursuant to 19 U.S.C. § 1677b(a)(4)(B). The implementing regulation for this provision states:

> In calculating foreign market value, the Secretary will make a reasonable allowance for a *bona fide* difference in the circumstances of the sales compared if the Secretary is satisfied that the amount of any price differential is wholly or partly due to such difference.

19 C.F.R. § 353.56(a)(1) (1993).

In *NTN II*, 20 CIT at ___, 905 F. Supp. at 1093–94, the Court upheld Commerce's denial of an adjustment where NTN failed to adequately support its claimed price differentials attributed to differences in levels of trade. In that case, as in the present one, NTN failed to quantify any price differentials directly attributable to differences in levels of trade. Thus, the Court finds that Commerce's denial of a level of trade adjustment for price differences is supported by substantial evidence and in accordance with law.

9. *Three Month Extended Period of Time Test:*

In this review, Commerce used a period of three months to define "extended period of time" for the purpose of testing whether to include certain below cost sales for its calculation of FMV. *Final Results,* 58 Fed. Reg. at 64,729. NTN insists that "extended period of time" should be interpreted as meaning at least 50 percent of the period. Pls.' Mem. Supp. Mot. J. Agency R. at 69–71.

Commerce disagrees, arguing that 19 U.S.C. § 1677b(b) does not specify what constitutes an "extended period of time." Commerce notes that NTN has failed to provide any reason why a three month period is inadequate for the purpose of measuring below-cost sales since NTN does not suggest that TRBs are perishable or subject to seasonal fluctuations. As such, Commerce asserts that its interpretation of the statute is reason-

able and should be sustained. Defs.' Mem. Opp'n to Pls.' Mot. J. Agency R. at 48–49.

This issue was addressed by the Court in *NTN I*, 18 CIT at ____, 881 F. Supp. at 592, where the Court found that absent information indicating that below-cost sales were a normal and expected characteristic of the trade in TRBs, Commerce's determination that three months constitutes an extended period of time is reasonable. *See also NTN*, 18 CIT at ____, 858 F. Supp. at 222. Therefore, this issue is hereby affirmed.

10. *Sales Made in Insufficient Quantities:*

NTN contends that Commerce, in the Final Results, used sales in insufficient quantities in determining FMV contrary to 19 U.S.C. § 1677b(b). NTN states that the printouts contained in the record in this case do not clearly identify the quantity of home market bearings used to determine FMV. As such, NTN requests that this case be remanded so that Commerce may disclose the information to NTN or, in the alternative, may supplement the record with the necessary data. Pls.' Mem. Supp. Mot. J. Agency R. at 71–72.

Commerce opposes NTN's request for a remand arguing that NTN has already received adequate disclosure of the results of Commerce's final determination. Commerce emphasizes that NTN is unable to identify an example of the use of insufficient quantities of home market sales to calculate FMV. Defs.' Opp'n to Pls.' Mot. J. Agency R. at 50. Finally, Commerce asserts that 19 U.S.C. § 1677b(b) does not define "inadequate" and, therefore, Commerce has broad discretion in determining what constitutes "inadequate" above-cost sales. *Id.* at 50–52.

NTN presented identical arguments to this Court in *NTN I*, 18 CIT at ____, 881 F. Supp. at 593. This Court found that NTN had not demonstrated that Commerce had, in fact, used insufficient quantities of home market sales in determining FMV. *Id.* The Court further noted that NTN failed to cite any record reference indicating that it requested information from Commerce concerning this issue. *Id.* NTN has similarly failed to substantiate its claim in the present case. Accordingly, the Court affirms Commerce's determination on this issue.

11. *Bearing Design Type:*

NTN contests Commerce's comparison of bearings of different design types. NTN argues that Commerce erred by comparing normal grade bearings with high precision grade bearings. NTN maintains that Commerce's model match methodology, sum of the deviations methodology and cost test all fail to recognize important distinctions between normal grade and high precision grade bearings. As a result, NTN submits that Commerce compared highly dissimilar merchandise. Pls.' Mem. Supp. Mot. J. Agency R. at 72–75.

Commerce addressed NTN's concerns on this issue in the Final Results by providing the following explanation:

> While other manufacturers also divide TRBs into design types, these design type categories are not consistent throughout the TRB industry. If we could not match across such categories, we would

> substantially limit the number of matches, thus working contrary to the statutory preference for price-to-price comparisons. If bearings are radically different, the sum of the deviations model-match methodology addresses the differences in physical criteria. In addition, any significant differences in component materials would be reflected in both the dynamic load ratio and Y factor and addressed by the 20-percent cap on the differences in the variable cost of manufacturing. Furthermore, NTN has not provided evidence demonstrating that HP [high precision] and normal precision bearings are being compared by the Department with distortive results.

58 Fed. Reg. at 64,721–22 (citation omitted).

Commerce's approach on this issue has previously been upheld by this Court in *NTN I*, 18 CIT at ____, 881 F. Supp. at 594, where the Court found that Commerce acted reasonably in comparing normal grade bearings with high precision grade bearings. The Court found that Commerce's methodology was reasonable and supported by law. Therefore, this issue is hereby affirmed.

CONCLUSION

In accordance with the foregoing opinion, the Court finds that Commerce's actions are supported by substantial evidence and in accordance with law. For the reasons stated above, NTN's motion for judgment upon the agency record is denied in all respects, and the Final Results are affirmed. This case is hereby dismissed.

(Slip Op. 96–68)

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF FRANCE S.A., SKF GMBH, SKF INDUSTRIE, S.P.A., SKF (U.K.) LTD., SKF SVERIGE, AB, FAG KUGELFISCHER GEORG SCHAFER KGAA, FAG CUSCINETTI SPA, FAG (UK) LTD., BARDEN CORP. (UK) LTD., FAG BEARINGS CORP., BARDEN CORP., BARDEN PRECISION BEARINGS CORP., RHP BEARINGS, RHP BEARINGS INC., PEER BEARING CO., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., NSK CORP., SNR ROULEMENTS, NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., AND NTN KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, DEFENDANT-INTERVENORS

Consolidated Court No. 92–06–00422

Plaintiff contests certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") final results of redetermination on remand filed pursuant to *Federal-Mogul Corp. v. United States*, 18 CIT ____, 862 F. Supp. 384 (1994) and *Federal-Mogul Corp. v. United States*, 18 CIT ____, 872 F. Supp. 1011 (1994) ("Remand Results").

Held: This case is remanded to Commerce to apply the tax-neutral value added tax ("VAT") methodology approved by the United States Court of Appeals for the Federal Circuit in *Federal-Mogul Corp. v. United States*, 63 F.3d 1572 (Fed. Cir. 1995), for respondents for whom the aforementioned methodology has not been utilized and recalculate the dumping margins accordingly. As this issue is being remanded, Commerce is also to correct the clerical computer programming errors identified by NSK Ltd. and NSK Corporation ("NSK") relating to the Japanese consumption tax which resulted in reversal of the arithmetic sign in the calculation of home market net price, purchase price price-to-price matches, exporter's sales price ("ESP") price-to-price matches, and ESP constructed value ("CV") matches for NSK. Further, Commerce is to correct the errors identified by plaintiff. Specifically, Commerce is to recalculate USP to exclude the VAT amount in CV-based foreign market value situations for FAG Kugelfischer Georg Schafer KGaA and RHP Bearings and RHP Bearings Inc. Commerce is also to correct the error pertaining to NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation which resulted from use of the flawed Statistical Analysis Software computer program and affected the U.S. sales data set, the home market sales data set, the margin analysis for parts further manufactured in the United States, and the CV data set for ball bearing models. Finally, Commerce is to correctly list SKF (U.K.) Limited's recalculated weighted-average dumping margin. Commerce's Remand Results are affirmed in all other respects.

[Case remanded to Commerce.]

(Dated April 19, 1996)

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley, Joseph A. Perna, V and *Larry Hampel)* for plaintiff, Federal-Mogul Corporation.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, Wesley K. Caine and *Robert A. Weaver)* for plaintiff-intervenor The Torrington Company.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis,* Assistant Director, *Marc E. Montalbine);* of counsel: *Stephen J. Claeys, Craig R. Giesze, Dean A. Pinkert, Thomas H. Fine, Alicia Greenidge* and *David J. Ross,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (Herbert C. Shelley, Alice A. Kipel, Juliana M. Cofrancesco and *Thomas J. Trendl)* for defendant-intervenors SKF USA Inc., SKF France S.A., SKF GmbH, SKF Industrie, S.p.A., SKF (U.K.) Limited and SKF Sverige, AB.

Grunfeld, Desiderio, Lebowitz & Silverman (Max F. Schutzman, Andrew B. Schroth, David L. Simon and *Matthew L. Pascocello)* for defendant-intervenors FAG Kugelfischer Georg Schafer KGaA, FAG Cuscinetti SpA, FAG (UK) Limited, Barden Corporation (UK) Limited, FAG Bearings Corporation, The Barden Corporation and Barden Precision Bearings Corporation.

Covington & Burling (Harvey M. Applebaum, David R. Grace and *Thomas A. Robertson)* for defendant-intervenors RHP Bearings and RHP Bearings Inc.

Venable, Baetjer, Howard & Civiletti (John M. Gurley and *Lindsay B. Meyer)* for defendant-intervenor Peer Bearing Company.

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Neil R. Ellis, T. George Davis, Niall P. Meagher and *Susan M. Mathews)* for defendant-intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Lipstein, Jaffe & Lawson (Robert A. Lipstein, Matthew P. Jaffe and *Grace W. Lawson)* for defendant-intervenors NSK Ltd. and NSK Corporation.

Grunfeld, Desiderio, Lebowitz & Silverman (Bruce M. Mitchell, David L. Simon, Philip S. Gallas, Jeffrey S. Grimson, Andrew B. Schroth and *Matthew L. Pascocello)* for defendant-intervenor SNR Roulements.

Barnes, Richardson & Colburn (Robert E. Burke, Donald J. Unger, Kazumune V. Kano and *Diane A. MacDonald)* for defendant-intervenors NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Corporation and NTN Kugellagerfabrik (Deutschland) GmbH.

OPINION

TSOUCALAS, *Judge:* Plaintiff, Federal-Mogul Corporation ("Federal-Mogul"), challenges certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") final results of redetermination on remand filed pursuant to *Federal-Mogul Corp. v. United States,* 18 CIT ____, 862 F. Supp. 384 (1994) concerning *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews ("Final Results"),* 57 Fed. Reg. 28,360 (1992), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 57 Fed. Reg. 32,969, (1992); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 57 Fed. Reg. 59,080 (1992).

BACKGROUND

In *Federal-Mogul Corp. v. United States,* 18 CIT ____, 862 F. Supp. at 412–13, the Court remanded this case to Commerce to: (1) examine the administrative record to determine the exact monetary amount of value added tax ("VAT") paid on each sale in the home market ("HM") and to assure that the amount added to the comparable United States price ("USP") sale pursuant to 19 U.S.C. § 1677a(d)(1)(C) (1988) is less than or equal to this amount; (2) add the full amount of VAT paid in the home market to foreign market value ("FMV") without adjustment; (3) treat currency hedging expenses as indirect selling expenses pursuant to 19 C.F.R. § 353.56(b)(2) (1992); (4) reinstate the "all other" cash deposit rate applicable prior to these final results for entries which have not become subject to assessment pursuant to a subsequent administrative review; (5) remove unaccounted for home market commission expenses from sales price before making the sales price to cost of production ("COP") comparison in the calculation of FMV for SKF GmbH ("SKF-Germany"); (6) correct the clerical error relating to percentage of the value reported as "COMI" with respect to Fag Cuscinetti SpA's ("FAG-Italy") financial expenses and to adjust FMV for FAG-Italy if this correction indicates that such an adjustment is appropriate; (7) add an amount for profit no less than eight percent to the COP data which was submitted in lieu of related-party transfer prices for FAG-Italy with respect to calculation of constructed value ("CV"); (8) determine whether FAG-Italy's technical services and warranty expenses meet the standard required for those expenses to be treated as direct expenses and subtracted from FMV; (9) develop a methodology which removes technical services and warranty expenses incurred on sales of out-of-scope merchandise from any adjustments made to FMV for FAG-Italy's technical services and warranty expenses. The Court instructed Commerce that if no viable method could be developed, Commerce was to deny such

adjustment in its calculation of FMV. Commerce was also to: (10) determine whether SKF-Industrie, S.p.A.'s ("SKF-Italy") U.S. bonded warehouse functioned as a warehouse or as a transport facility and to adjust USP if it found that the warehouse expense was incurred incident to bringing SKF-Italy's merchandise to the place of delivery in the United States; and (11) explain how it concluded that SKF-Italy had sufficient imports of raw materials to warrant a duty drawback adjustment to USP or, if unable to do so, to recalculate USP for SKF-Italy without an adjustment for duty drawback.

This remand affects twenty-six of the reviewed companies from six countries with respect to antidumping orders on ball bearings.

In *Federal-Mogul Corp. v. United States*, 18 CIT ___, ___, 872 F. Supp. 1011, 1017–18 (1994), the Court again remanded this case for various ministerial errors so that Commerce could: (1) deduct direct warranty expenses in calculating USP for SNR Roulements ("SNR"); (2) deduct U.S. repacking costs in calculating USP for INA Walzlager Schaeffler KG ("INA"); (3) determine whether Commerce miscalculated adjusted price for SKF-Germany; (4) determine whether it miscalculated FMV for Showa Pillow Block Manufacturing Co., Ltd. ("Showa Pillow Block"); (5) determine whether it miscalculated constructed value for Inoue Jikuuke Kogyo Co., Ltd. ("IJK"); (6) determine whether it miscalculated exporter's sales price ("ESP") for Izumoto Seiko Co., Ltd. ("Seiko"); (7) determine whether it miscalculated adjusted price for Nachi-Fujikoshi Corp. ("Nachi"); and (8) determine whether it miscalculated FMV for FAG (UK) Ltd. ("Fag-UK").

This remand affects eight of the reviewed companies from four countries with respect to the antidumping orders on ball bearings.

On February 27, 1995, Commerce submitted its redetermined final results entitled *Federal-Mogul Corp. v. United States, Slip Op. 94–136 (August 26, 1994), Slip Op. 94–198 (December 20, 1994), Final Results of Redetermination Pursuant to Court Remand ("Remand Results")*.

DISCUSSION

Commerce's final results filed pursuant to a remand will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

1. *Value Added Tax Calculation and Adjustment:*

In this review, "[b]ecause all HM [home market] sales were reported net of VAT, [Commerce] added the same VAT amount to FMV as that calculated for USP." *Final Results*, 57 Fed. Reg. at 28,419. Commerce explained, "This is equivalent to calculating the actual HM tax and then performing a COS [circumstance of sale] adjustment to FMV to eliminate the absolute difference between the amount of tax in each market."

Id. Commerce "calculated the addition to USP by applying the HM tax rate to the net USP after all other adjustments were made." *Id.* at 28,420. Commerce "applied the foreign market tax rate to a USP calculated at an appropriate point in the chain of commerce." *Federal-Mogul,* 18 CIT at ____, 862 F. Supp. at 392. In remanding the Final Results, the Court directed Commerce to determine the exact monetary amount of VAT paid on each home market sale and ensure that the amount added to the comparable USP sale pursuant to 19 U.S.C. § 1677a(d)(1)(C) is less than or equal to that amount and to add the full amount of VAT paid in the home market to FMV without a COS adjustment. *Federal-Mogul,* 18 CIT at ____, 862 F. Supp. at 412. The Court instructed Commerce to use the amount of VAT paid on each home market sale, as evidenced by respondents' VAT records, as a "cap" on the amount of the adjustment made to the comparable USP sale. *Id.* at ____, 862 F. Supp. at 395.

Commerce "complied with the instructions of the Court" which directed it not to make a COS adjustment. *Remand Results* at 28. To comply, Commerce has changed its VAT methodology and

> added to USP the result of multiplying the foreign market tax rate by the price of the United States merchandise at the same point in the chain of commerce that the foreign market tax was applied to foreign market sales. [Commerce] has also adjusted the USP tax adjustment and the amount of tax included in FMV. These adjustments deduct the portions of the foreign market tax and the USP tax adjustment that are the result of expenses that are included in the foreign market price used to calculate foreign market tax and are included in the United States merchandise price used to calculate the USP tax adjustment and that are later deducted to calculate FMV and USP. These adjustments to the amount of the foreign market tax and the USP tax adjustment are necessary to prevent our new methodology for calculating the USP tax adjustment from creating antidumping duty margins where no margins would exist if no taxes were levied upon foreign market sales.

Remand Results at 5.

According to Commerce, the "current methodology does not base adjustments on differing tax bases, and thus does not require 'capping.'" *Remand Results* at 19. Commerce also submits that its new methodology "has the same effect as a cap." *Id.* at 22. Commerce explains further:

> The tax added to USP, adjusted for the amount attributable to expenses, will be less than that added to FMV whenever the final USP is less than or equal to the final FMV, *i.e.* whenever the U.S. sale is dumped. Further, whenever the U.S. tax base exceeds the home market tax base, there would be no dumping margin regardless of whether the amount of tax added to USP is equal to or exceeds the amount included in FMV.

Id.

Federal-Mogul challenges Commerce's failure to cap the amount of the tax adjustment to USP as required by the Court. Federal-Mogul con-

tends that under Commerce's new methodology, the additur to USP may exceed the amount of the home market tax included in FMV where the U.S. tax base exceeds the home market tax base. Pl.'s Comments on Remand Results at 4. Federal-Mogul argues that capping is imperative because capping affects "the total USP, which is the denominator used to calculate a respondent's weighted-average margin." *Id.* at 7. Federal-Mogul is concerned because there is not yet any indication of how the Remand Results will be implemented for purposes of assessment and because weighted-average margins are important with respect to eligibility for partial revocation of dumping orders. *Id.*

Although Commerce maintains that it has not had an opportunity to address Federal-Mogul's argument in the context of its new tax methodology, it argues that its longstanding position is that 19 U.S.C. § 1677a(d)(1)(C) merely prohibits a tax adjustment to USP where taxes in the home market were not actually paid to the government. *Remand Results* at 19–21. Commerce relies on *Daewoo Elecs. Co. v. International Union of Elec., Elec., Technical, Salaried and Mach. Workers, AFL-CIO ("Daewoo")*, 6 F.3d 1511, 1516–17 (Fed. Cir. 1993), *cert. denied sub nom., International Union of Elec., Elec., Technical, Salaried and Mach. Workers, AFL-CIO v. United States*, 114 S. Ct. 2672 (1994), for support,[1] inferring from *Daewoo* that the statute does not require that the amount of the tax adjustment to USP be capped. *Id.* According to Commerce, the language "to the extent" in § 1677a(d)(1)(C) imposes a limitation only on *when* the U.S. adjustment can be made, not on the *amount* of that adjustment. *Id.* at 20. With respect to cash deposit rates, Commerce maintains that "to impose a cap on the deposit rate would, in effect, conflict with the requirement of this court that the U.S. tax adjustment be calculated by multiplying the U.S. tax base by the home market tax rate." *Id.* at 22. According to Commerce, "[a] capped U.S. tax adjustment is equivalent to applying a tax rate to USP lower than that applied in the home market." *Id.*

Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo") inform the Court that only this issue in the Remand Results has impacted on Koyo's margins. According to Koyo, a cap to the VAT adjustment to USP is unnecessary. Koyo argues, however, that even if capping is proper, a remand regarding Koyo is unnecessary because capping would have only a *de minimis* effect on Koyo's dumping margin and the cash deposit rate applicable to Koyo has been superseded. Koyo requests that the Court affirm the Remand Results on this issue. Reply of Def.-Int. Koyo to Comments by Pl. on Remand Results at 3–6.

NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation ("NTN") seek entry of final judgment pursuant to CIT Rule 54(b).[2] According to NTN,

---

[1] The cited pages in *Daewoo* relate to the question of whether Commerce is required to undertake a tax incidence analysis.

[2] CIT Rule 54(b) allows the Court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of final judgment."

"[t]here is no just reason for delay in the entry of a final judgment with respect to NTN" as only the VAT issue affects NTN and it "has since been mooted" by *Federal-Mogul,* 63 F.3d at 1572, where Commerce's "pre-remand methodology in this case was affirmed." Def.-Int. NTN's Mot. for Entry of Final J at 1. NTN claims that, since all issues in which NTN had a stake have now been decided, "[i]t would be unfair to require NTN to await the conclusion of remand proceedings in which it has no stake." *Id.* at 2. NTN also points out that it was not included in the most recent results filed with this Court on March 1, 1996. *Id.*

Regarding the adjustment methodology for the Japanese consumption tax, NSK Ltd. and NSK Corporation ("NSK") point out that Commerce inadvertently reversed the applicable arithmetic sign in four lines of programming, adversely affecting NSK. According to NSK, the errors pertain to calculation of (1) home market net price; (2) purchase price price-to-price matches; (3) ESP price-to-price matches; and (4) ESP CV matches. NSK requests a further remand for correction of this error. Comments of Def.-Int. NSK on Remand Results at 1–4.

Commerce agrees that the errors identified by NSK should be remanded for correction. Def.'s Resp. to Comments on Remand Results at 17.

Adjustments to USP for consumption taxes forgiven on merchandise which is exported to the United States are governed by 19 U.S.C. § 1677a(d)(1)(C). In *Federal-Mogul Corp. v. United States,* 17 CIT 88, 95, 813 F. Supp. 856, 862 (1993), *rev'd on other grounds,* 63 F.3d 1572 (Fed. Cir. 1995), the Court held that

> the plain meaning of the phrase, "but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation" simply means that [Commerce] is to adjust USP in an amount less than or equal to, but not greater than, the actual amount of tax paid on a sale of the subject merchandise in the home market as represented on the company's books or elsewhere in the administrative record.

Thus, the Court viewed the statutory phrase in question as addressing the issue of "capping" the actual monetary amount added to USP to adjust for the foreign VAT by the actual amount of tax paid in the home market.[3] *Id.* at 95, 813 F. Supp. at 862.

The court has since observed that, although earlier cases have imposed a cap related to Commerce's prior methodology of adjusting for absolute amount of the foreign market tax, more recently, "the court has required that the VAT adjustment be made via application of the home market tax rate to a tax base that is appropriately adjusted."[4] *Zenith*

---

[3] In *Zenith Elecs. Corp. v. United States,* 10 CIT 268, 633 F. Supp. 1382 (1986), *appeal dismissed,* 875 F.2d 291 (Fed. Cir. 1989), Judge Watson, in the context of resolving a measurement of economic tax incidence question, observed that the "to the extent" language in the 1974 amendment was intended to impose a cap on the amount of taxes that could be added to USP. While the CAFC overruled Judge Watson's further interpretation of the "to the extent" language as requiring a measurement of tax incidence, the CAFC did not invalidate Judge Watson's observations regarding capping. *See Daewoo,* 6 F.3d at 1511.

[4] *See, e.g., Torrington Co. v. United States,* 18 CIT ___, ___, 866 F. Supp. 1434, 1437 (1994), *aff'd,* 68 F.3d 1347 (Fed. Cir. 1995); *Federal-Mogul Corp. v. United States,* 17 CIT 1093, 1098–99, 834 F. Supp. 1391, 1396–97 (1993) (holding that Commerce is to apply the rate of forgiven VAT to USP, calculated at the same point in the stream of commerce as where the VAT is applied for home market sales, and to add the resulting amount to USP, without a COS adjustment to FMV), *rev'd,* 63 F.3d 1572 (Fed. Cir. 1995).

Elecs. Corp. v. United States, 19 CIT ___, ___, Slip Op. 95–38 at 2–3 (Mar. 13, 1995). In *Zenith*, the court upheld a methodology identical to Commerce's current methodology, remarking that "Commerce's new methodology * * * does not require the cap applicable to the prior methodology." *Id.* at ___, Slip Op. 95–38 at 3 (citing *Federal-Mogul*, 19 CIT at ___, 862 F. Supp. at 394–95). Thus, Commerce's "new" methodology has previously received judicial approval. *See also Zenith Elecs. Corp. v. United States*, 19 CIT ___, ___, Slip Op. 95–35 at 2 (Mar. 9, 1995); *Torrington Co. v. United States*, 18 CIT ___, ___, 853 F. Supp. 446, 448–49 (1994); *Independent Radionic Workers of Am. v. United States*, 18 CIT ___, ___, 862 F. Supp. 422, 426 (1994); *Zenith Elecs. Corp. v. United States*, 18 CIT ___, Slip Op. 94–146 (Sept. 19, 1994).

As noted, Commerce's current methodology calculates the additur to USP by applying the HM tax rate to the USP. *Remand Results* at 5. The methodology of applying the *rate* of VAT to the United States merchandise, and then adding to the USP the result of the calculation, creates a distortion in the dumping margin due to a mathematical peculiarity known as the "multiplier effect."[5] The United States Court of Appeals for the Federal Circuit ("CAFC") has recently upheld a methodology used previously by Commerce which sought to eliminate the multiplier effect by adding the actual *amount* of the VAT to the USP. *Federal-Mogul*, 63 F.3d at 1580.

In reaction to the CAFC's decision in *Federal-Mogul*, 63 F.3d at 1572, and subsequent to filing the Remand Results, Commerce informed the Court that it now wishes to return to the tax-neutral methodology approved by the Federal Circuit. Therefore, the Court remands the VAT issue to Commerce to apply the tax-neutral methodology approved by the CAFC in *Federal-Mogul*, 63 F.3d at 1572, for respondents for whom the aforementioned methodology has not been utilized and recalculate the dumping margins accordingly.[6] As this issue is being remanded, Commerce is also to correct the clerical computer programming errors identified by NSK relating to the Japanese consumption tax which resulted in reversal of the arithmetic sign when calculating home market net price, purchase price price-to-price matches, ESP price-to-price matches, and ESP CV matches for NSK.

In addition, the Court rejects NTN's motion for final judgment concerning NTN. Although under CIT Rule 54(b), the Court may direct the entry of an early final judgment in appropriate circumstances, the Court does so at its discretion, taking into consideration the Court's interest in

---

[5] The "multiplier effect" penalized foreign producers by inflating their existing dumping margins. *Federal-Mogul*, 17 CIT at 1096 & n.1, 834 F. Supp. at 1394–95 & n.1.

[6] Since filing the Remand Results, the Court has granted motions submitted by SNR, SKF and Koyo, and remanded the VAT issue in this case for further proceedings in accordance with the CAFC's opinion in *Federal-Mogul*, 63 F.3d at 1572. *Federal-Mogul Corp. v. United States*, 19 CIT ___, Slip Op. 95–181 (Nov. 14, 1995); *Federal-Mogul Corp. v. United States*, 19 CIT ___, Slip Op. 95–184 (Nov. 20, 1995); *Federal-Mogul Corp. v. United States*, 19 CIT ___, Slip Op. 95–186 (Nov. 20, 1995).

In addition, Commerce has informed the Court, and the Court agrees, that recalculations were unnecessary for (1) Nippon Pillow Block Sales, Co., Ltd. and Uchiyama Manufacturing Corporation because their margins were based on best information available, and (2) Meter, S.p.A. ("Meter") because all of Meter's U.S. sales were matched to constructed value only. *Remand Results* at 6–7.

"sound judicial administration" and the "preser[vation of] the historic federal policy against piecemeal appeals." *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7–8 (1980) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436–38 (1956)). *See also Timken Co. v. Regan*, 5 CIT 4 (1983). The Court believes that a final judgment with respect to all of the issues can be expected in the foreseeable future. Therefore, there is no unfairness in requiring NTN to await the conclusion of litigation and the entry of a final judgment with respect to all claims raised by this case. The Court's decision will allow all parties dissatisfied with the final judgment in this case to appeal that judgment at the same time with respect to all issues covered by the underlying decisions with which they are dissatisfied.

2. *Currency Hedging Expenses:*

The Court remanded this issue to Commerce to treat hedging expenses as indirect selling expenses pursuant to 19 C.F.R. § 353.56(b)(2). *Federal-Mogul*, 18 CIT at ___, 862 F. Supp. at 412. Commerce has now "reclassified the currency hedging adjustments claimed by FAG-Italy, FAG-Germany [FAG Kugelfischer Georg Schafer KGaA], and RHP [RHP Bearings and RHP Bearings Inc.] as indirect adjustments to USP." *Remand Results* at 7. As this aspect of the case is uncontested, the Court sustains Commerce's Remand Results which comply with the Court's instructions to treat currency hedging expenses as indirect selling expenses.

3. *"All Others" Rate:*

The Court remanded this issue to Commerce to reinstate the "all others" cash deposit rate applicable prior to these final results for entries which have not become subject to assessment pursuant to a subsequent administrative review. *Federal-Mogul*, 18 CIT at ___, 862 F. Supp. at 412. Commerce states that it "will instruct" the United States Customs Service to comply with the Court's order. *Remand Results* at 8.

Federal-Mogul and defendant-intervenors, SKF USA Inc., SKF-Germany, SKF France, S.A., SKF-Italy, SKF Sverige AB and SKF (U.K.) Limited (collectively "SKF"), protest Commerce's failure to clarify which cash deposit rates from the less-than-fair-value ("LTFV") investigations have been reinstated. Pl.'s Resp. to Comments of Def.-Ints. on Remand Results at 2; Comments of Def.-Int. SKF on Remand Results at 3–5. Concerned specifically about the Swedish and Italian ball bearing "all others" rates, SKF requests that Commerce be required to specify the relevant rates or at least cite to the Federal Register notices which amend original LTFV rates. Comments of Def.-Int. SKF on Remand Results at 4–5.

These arguments are without merit. Commerce has complied with the Court's instructions. It is obvious that where a LTFV "all others" rate has been amended, that rate governs where Commerce is directed to reinstate the original LTFV investigation "all others" rate. *See, e.g., UCF Am. Inc. v. United States*, 20 CIT ___, ___, Slip Op. 96–42 at 8–9 (Feb. 27, 1996) (holding that the original "all others" LTFV rate was a

nullity where Commerce amended the rate, the revision was unchallenged and sustained by the Court and the Court's decision was affirmed by the CAFC). Original LTFV results and amendments are easily accessible from the Federal Register. Therefore, the Remand Results on this issue are sustained as submitted.

4. *SKF-Germany's Home Market Commission Expenses:*

With respect to performing the comparison of sales price with COP for SKF-Germany, the Court remanded this case to Commerce to allow it "to remove unaccounted for home market commission expenses from sales price before making the sales price to cost of production comparison for SKF-Germany so that [Commerce] may fairly evaluate whether any home market sales fall within the purview of 19 U.S.C. § 1677b(b) in the calculation of FMV." *Federal-Mogul*, 18 CIT at ___, 862 F. Supp. at 401. On remand, Commerce removed SKF-Germany's home market commission expenses paid on home market sales from home market prices prior to making comparisons to COP. *Remand Results* at 8.

SKF argues alternatively that (1) Commerce was not required to take any action on remand as SKF's COP totals include commissions or, if the deduction was required, (2) Commerce performed the deduction perfectly but its erroneous statement in the Remand Results that the "COP totals do not include commissions" should be revised. Comments of Def.-Int. SKF on Remand Results at 5–6;[7] Remand Results at 8.

Commerce maintains that it interpreted the phrase "unaccounted for home market commissions" in the Court's decision as "a holding by this Court that home market commissions * * * were not included in the COP to which home market sales were compared." Def.'s Resp. to Comments on Remand Results at 15.

Although Commerce's interpretation of the Court's ruling was incorrect in that the Court's remand instruction merely responded to Commerce's desire to investigate whether the COP comparison at issue included any home market sales containing commissions,[8] Commerce has now "independently determined that it cannot conclude that SKF-Germany's COP includes commissions."[9] *Id.; Remand Results* at 8.

Inasmuch as the Court ordered Commerce to remove deductions for "unaccounted" commissions and the administrative record does not indicate that the reported figure actually includes commissions,[10] this aspect of Commerce's determination is supported by substantial evidence and is otherwise in accordance with law.

---

[7] SKF suggests that the following text be substituted for the alleged misstatement by Commerce: "Although the selling expense totals included in the COP totals reported by SKF include home market commission expenses, no adjustment to COP was necessary; removal of these commission expenses would not result in a change in the selling expense factor relied upon by SKF in calculating the selling expense amounts reported in the COP calculations." Comments of Def.-Int. SKF on Remand Results at 6.

[8] *Federal-Mogul*, 18 CIT at ___, 862 F. Supp. at 401.

[9] In addition, SKF essentially admits that the inclusion or exclusion of home market commissions from SKF's COP does not alter the expense factor and, therefore, has no effect on the calculations. *See* Comments of Def.-Int. SKF on Remand Results at 5–6.

[10] *See* SKF's Exhibit C, letter to Commerce dated October 27, 1994 at 7, n.6 and documents cited therein.

5. *Fag-Italy's Financial Expenses:*

The Court remanded this issue to Commerce with respect to FAG-Italy's financial expenses to correct the clerical error relating to percentage of the value reported as "COMI" and, if appropriate, to adjust FMV after making the correction. *Federal-Mogul,* 18 CIT at ____, 862 F. Supp. at 413.

Commerce corrected the mathematical clerical error in FAG-Italy's reported financial expenses as instructed by the Court. Because this correction affects FAG-Italy's reported costs of production, Commerce performed a new cost test and disregarded all sales made below the revised costs of production in its calculation of FMV. *Remand Results* at 8–9. Accordingly, the Court sustains Commerce's handling of FAG-Italy's financial expenses upon remand.

6. *FAG-Italy's Related-Party Transfer Prices:*

In this review, FAG-Italy only reported COP data for inputs from its related suppliers. It did not report transfer prices or demonstrate that it had purchased the inputs at arm's-length prices. For purposes of calculating CV, the Court instructed Commerce to add to FAG-Italy's reported costs of inputs from related suppliers, an amount for profit representing not less than the eight percent statutory minimum and to make any adjustments to CV that may be required as a result. *Federal-Mogul,* 18 CIT at ____, 862 F. Supp. at 403–04.

Commerce concluded that the Court's instructions required it "to add profit to constructed value twice: once on each input purchased from a related party, and again on the total of all inputs." *Remand Results* at 9. Because an arms-length market does not exist for the subject related-party inputs, Commerce was unable to determine an actual profit amount. Therefore, it determined profit at eight percent pursuant to 19 U.S.C. § 1677b(e)(1)(B)(ii) (1988). *Id.* at 9. In addition, "for purposes of this determination, [Commerce] added an eight percent profit margin to all of FAG-Italy's reported costs of materials" because Fag-Italy was unable to provide it with a methodology for identifying which products contain related-party inputs and which do not. *Id.* at 9–10.

As this aspect of Commerce's Remand Results are not contested and Commerce has complied with the Court's remand instructions with respect to profit, the Court sustains Commerce's treatment of FAG-Italy's reported costs of inputs from related suppliers for purposes of calculating constructed value.

7. *Fag-Italy's Technical Services and Warranty Expenses:*

The Court remanded this issue to Commerce to determine whether FAG-Italy's allocation methodology for technical services and warranty expenses meets the standard set forth in *Smith-Corona Group Consumer Prod. Div., SCM Corp. v. United States,* 713 F.2d 1568, 1579–81 (Fed. Cir. 1983), *cert denied,* 465 U.S. 1022 (1984), for those expenses to be treated as direct expenses and subtracted from FMV. *Federal-Mogul,* 18 CIT at ____, 862 F. Supp. at 406. Commerce was also instructed "to

develop a methodology which removes technical services and warranty expenses incurred on sales of out-of-scope merchandise from any adjustments made to FMV for these expenses" and, if no viable method for removal could be developed, "to deny an adjustment for [these expenses] in its calculation of FMV for FAG-Italy." Id. at ____, 862 F. Supp. at 407.

Commerce fully complied with the Court's remand instructions. First, Commerce determined that FAG-Italy's technical services and warranty expenses were not granted or incurred as a fixed percentage of sales value and, therefore, do not meet the *Smith-Corona* standard to be treated as direct expenses. *Remand Results* at 10–11. Second, Commerce found that FAG-Italy's methodology for reporting these expenses included expenses incurred on non-scope merchandise. The administrative record did not contain information which would permit removal of those portions of the subject expenses related to non-scope merchandise from the adjustments to FMV. *Id.* at 11–12. Further, a methodology proposed by respondent was "essentially the same methodology" used in FAG-Italy's questionnaire response and "produce[d] the same technical services and warranties expense factor" FAG-Italy reported, and did not separate expenses incurred on scope- and non-scope merchandise. *Id.* at 12. Therefore, Commerce denied FAG-Italy adjustments to FMV for technical services and warranties expenses. *Id.*

Accordingly, Commerce's treatment of FAG-Italy's technical services and warranties expenses is sustained.

8. *SKF-Italy's Warehouse Expenses:*

Concerning certain purchase price ("PP") transactions made by SKF-Italy to one of its U.S. customers, the Court directed Commerce to determine whether one of SKF-Italy's U.S. bonded warehouse facilities located in a foreign trade zone ("FTZ") functioned as a warehouse or a transport facility. In particular, the Court believed it important to ascertain why, and for what length of time, the subject merchandise resided in the warehouse. *Federal-Mogul,* 18 CIT at ____, 862 F. Supp. at 409.

On remand, Commerce examined the record and reached the following conclusions. The warehouse in question serves as more than just a transport facility. SKF-Italy's PP sales are stored in the FTZ facility until sold to the U.S. customer, thus actual storage costs are incurred on behalf of this customer. Inventory carrying costs information for these transactions allowed Commerce to estimate that the average storage time for the PP sales is considerably more than a month—a period comparable to SKF-Italy's U.S. warehouse storage time for ESP transactions. *Remand Results* at 13.

As the record corroborates that the facility in question functions as a warehouse and the warehouse cost related to the facility is not specifically incurred for the purpose of moving the subject merchandise to the place of delivery in the United States, Commerce was correct in initially not deducting the cost as a movement expense. Therefore, Commerce's determination is sustained on this issue.

9. *SKF-Italy's Duty Drawback Adjustment:*

The Court instructed Commerce to apply the two-prong test to determine SKF-Italy's entitlement to a duty drawback adjustment under 19 U.S.C. § 1677a(d)(1)(B). This test requires that (1) the import duty and rebate be directly linked to, and dependent upon, one another; and that (2) the party claiming an adjustment demonstrate sufficient imports of the raw material to account for the duty drawback received on the exports of the subject merchandise. *See Final Determination of Sales at Less Than Fair Value: Certain Welded Stainless Steel Pipes From Taiwan,* 57 Fed. Reg. 53,705, 53,709–10 (1992). While the Court was satisfied that SKF-Italy met the first prong of this test, the Court directed Commerce to explain how it concluded that the second prong had been met. If unable to do so, Commerce was instructed to deny the adjustment. *Federal-Mogul,* 19 CIT at ____, 862 F. Supp. at 410.

Commerce has examined SKF-Italy's Section D response and has informed the Court that the firm purchased sufficient imported steel from its related supplier to account for the quantity of finished bearings shipped to the United States. *Remand Results* at 14. As Commerce has clarified that SKF-Italy documented sufficient imports of raw materials to account for the duty drawback claimed, Commerce's determination is affirmed on this issue.

10. *SNR's Direct Warranty Expenses on U.S. Sales:*

With respect to SNR, Commerce's Final Results inadvertently omitted SNR's direct warranty expenses from the calculation of total U.S. direct selling expenses and, consequently, from total U.S. selling expenses which are, in turn, subtracted from unit price in the USP calculation. *Federal-Mogul,* 18 CIT at ____, 872 F. Supp. at 1014. The Court remanded this case to Commerce for correction of this error. *Id.*

Commerce has now "included [SNR's] direct warranty expenses on U.S. sales in the calculation of total U.S. direct selling expenses. *Remand Results* at 15. Therefore, the Court sustains the Remand Results with respect to this issue.

11. *INA's U.S. Repacking Costs:*

In the Final Results, Commerce made an error in calculating the ESP variant of USP for INA by inadvertently failing to deduct the costs of INA's additional packing performed in the United States. The Court remanded this case to Commerce for correction of this error. *Federal-Mogul,* 18 CIT at ____, 872 F. Supp. at 1015.

Commerce has now corrected this computer error and deducted these expenses for additional packing performed in the United States from ESP for INA. *Remand Results* at 15. The Court, therefore, sustains this aspect of the Remand Results.

12. *SKF Germany's Adjusted Price:*

The Court remanded this case to Commerce to determine whether it miscalculated SKF-Germany's adjusted price by failing to deduct

domestic pre-sale freight and inland freight expenses. *Federal-Mogul,* 18 CIT at ____, 872 F. Supp. at 1015.

Commerce has now determined that it inadvertently failed to deduct these expenses from adjusted price for SKF-Germany before comparing adjusted price with COP when testing for sales made at prices below COP. Accordingly, Commerce made the appropriate deduction. *Remand Results* at 16. Therefore, the Court sustains Commerce's treatment of adjusted price for SKF-Germany.

13. *Calculation of Showa Pillow Block's Foreign Market Value:*

In *Federal-Mogul,* 18 CIT at ____, 872 F. Supp. at 1016, the Court remanded this part of the action for Commerce to determine whether it inadvertently omitted U.S. export inspection fees in calculating FMV for Showa Pillow Block.

Upon remand, Commerce determined that it excluded these inspection fees from the calculation of U.S. direct expenses which are, in turn, added to the FMV. Commerce has now included U.S. export inspection fees in the calculation of total U.S. direct expenses. *Remand Results* at 16. Accordingly, the Court sustains Commerce's unopposed treatment of Showa Pillow Block's inspection fees.

14. *IJK's Constructed Value, Izumoto Seiko's Exporter's Sales Price, Nachi's Adjusted Price, and FAG-UK's Foreign Market Value:*

In the interest of accuracy in final determinations, the Court instructed Commerce to determine whether it (1) erroneously deducted interest expense in the calculation of CV for IJK; (2) improperly calculated exporter's sales price for Seiko by failing to deduct all known cost and expense elements from unit price in calculating entered value for ESP sales; (3) improperly handled rebates in calculating Nachi's adjusted home price for comparison with COP for purposes of testing for sales made at prices below COP; and (4) improperly calculated foreign market value for FAG UK by erroneously adding U.S. repacking costs instead of home market packing costs. If Commerce agreed that these errors are ministerial, Commerce was directed to make the appropriate corrections. *Federal-Mogul,* 18 CIT at ____, 872 F. Supp. at 1017.

With respect to IJK, Commerce has examined whether certain interest expenses were erroneously deducted in the calculation of CV and has determined that the amount of IJK's interest expenses that was reported as a component of its total general and administrative expenses was deducted. Commerce corrected this error by not subtracting this interest expense in the calculation of CV. *Remand Results* at 16–17.

As Commerce has corrected this inadvertent error related to IJK's interest expenses, the Court sustains the Remand Results on this issue.

Concerning Seiko, Commerce reports that for transactions where entered values were missing or zero for ESP, it originally calculated entered value by subtracting ocean freight and marine insurance from unit price. Upon remand and further consideration, Commerce determined that U.S. duty, customs and brokerage fees, and U.S. inland

freight should also have been subtracted and has made this correction. *Remand Results* at 17.

As Commerce has now deducted all known cost and expense elements from unit price in calculating entered value for Seiko's ESP sales, the Court sustains this aspect of the Remand Results.

As to Nachi, Commerce examined whether it had improperly handled rebates in calculating adjusted home market price for comparison with COP for purposes of testing sales made at prices below COP. It "determined that (1) rebates to related parties were erroneously discarded before aggregating total rebates to be deducted in the calculation of adjusted price, and (2) rebates were errone-ously set equal to zero in the calculation of the adjusted price where the rebates exceeded unit price." *Remand Results* at 17–18. Commerce has now corrected both of these errors. *Id.* at 18.

Therefore, the Court sustains the Remand Results with respect to Nachi's adjusted price.

Finally, Commerce examined whether it had incorrectly calculated FAG-UK's FMV for comparisons to ESP sales by adding U.S. repacking expenses and determined that U.S. repacking costs were improperly added. Commerce corrected the inadvertent error and "added home market packing expenses incurred in preparing the subject merchandise for shipment to the United States, instead of U.S. repacking expense, in the calculation of FMV for comparisons to ESP sales." *Id.*

As Commerce has now added home market packing expenses instead of U.S. repacking expenses in the calculation of FAG-UK's FMV for comparisons to ESP sales, the Court sustains this aspect of the Remand Results.

15. *Clerical or Ministerial Errors in the Remand Results:*

Federal-Mogul alleges that, in compiling the Remand Results, Commerce committed several ministerial, clerical, or otherwise inadvertent and indisputable errors in calculating USP and FMV for specific respondents. First, Federal-Mogul claims that Commerce erroneously included in USP for FAG-Germany and RHP, an amount for taxes in those instances in which USP was compared with FMV calculated on the basis of CV. Pl.'s Comments on Remand Results at 8–9.

In the Remand Results, Commerce agreed with Federal-Mogul that, in CV-based FMV situations, USP should be tax exclusive. The Remand Results purport to have recalculated USP in CV situations to exclude the VAT amount. *Remand Results* at 23.

Federal-Mogul claims that, in fact, Commerce failed to recalculate USP in CV situations. Pl.'s Comments on Remand Results at 9. Commerce concedes that Federal-Mogul's claim is correct and requests a remand to rectify the error. Def.'s Resp. to Comments on Remand Results at 10–11. Therefore, this issue is remanded to Commerce with respect to FAG-Germany and RHP to allow Commerce to recalculate USP to exclude VAT in CV-based FMV situations.

Second, Federal-Mogul claims that the Statistical Analysis Software ("SAS") computer program used to generate the Remand Results for NTN is so seriously flawed that the results are meaningless. Specifically, Federal-Mogul alleges errors affecting the U.S. sales data set, the home market sales data set, the margin analysis for parts further manufactured in the United States, and the CV data set for ball bearing models. Pl.'s Comments on Remand Results at 9–13.

Commerce agrees that NTN's dumping margins should be recalculated and requests a remand. Def.'s Resp. to Comments on Remand Results at 11. Therefore, this case is remanded to allow Commerce to correct the errors pertaining to NTN which resulted from use of a flawed SAS computer program.

Finally, Federal-Mogul claims that in its comments to Commerce concerning the draft remand results, it pointed out that in calculating FMV for comparison to ESP for SKF (U.K.) Ltd. ("SKF-U.K."), Commerce's computer program failed to add home market taxes to FMV, resulting in a comparison of tax-*inclusive* USPs with tax-*exclusive* FMVs. Pl.'s Comments on Remand Results at 14.

The Remand Results recognize this error and state that the necessary corrections were made. Remand Results at 24.

Federal-Mogul acknowledges that the necessary corrections were made but argues that Commerce failed to list the correct recalculated weighted-average dumping margin for SKF-U.K. Pl.'s Comments on Remand Results at 14. Commerce agrees that the Remand Results should be corrected with respect to this error. Def.'s Resp. to Comments on Remand Results at 11. Therefore, this issue is remanded to Commerce to allow it to correctly list SKF-U.K.'s recalculated weighted-average dumping margin.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to Commerce to apply the tax-neutral methodology approved by the CAFC in *Federal-Mogul,* 63 F.3d at 1572, for respondents for whom the aforementioned methodology has not been utilized and recalculate the dumping margins accordingly. As this issue is being remanded, Commerce is also to correct the clerical computer programming errors identified by NSK relating to the Japanese consumption tax which resulted in reversal of the arithmetic sign in the calculation of home market net price, purchase price price-to-price matches, ESP price-to-price matches, and ESP CV matches for NSK. Further, Commerce is to correct the errors identified by Federal-Mogul. Specifically, Commerce is to recalculate USP to exclude the VAT amount in CV-based FMV situations for FAG-Germany and RHP. Commerce is also to correct the error pertaining to NTN which resulted from use of a flawed SAS computer program and affected the U.S. sales data set, the home market sales data set, the margin analysis for parts further manufactured in the United States, and the CV data set for ball bearing models. Finally, Commerce is to cor-

rectly list SKF-U.K.'s recalculated weighted-average dumping margin. Commerce's Remand Results are affirmed in all other respects.

The Remand Results are due within thirty (30) days of the date this opinion is entered. Any comments or responses by the parties to the Remand Results are due within fifteen (15) days thereafter.

Index

Customs Bulletin and Decisions
Vol. 30, No. 19, May 8, 1996

U.S. Customs Service

General Notices

CUSTOMS RULINGS LETTERS

U.S. Court of International Trade

Slip Opinions

Federal Recycling Program
Printed on Recycled Paper
U.S. G.P.O. 1996–405–477–00087